United States Court of Appeals for the Second Circuit



APPENDIX

74-8058

United States Court of Appeals for the second circuit

35

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

-against-

STANTON FREEMAN, et al.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX FOR DEFENDANT-APPELLANT Vol. 1—Pages 1 to 310



Beldock Levine & Hoffman 565 Fifth Avenue New York, New York 10017 (212) 490-0400 PAGINATION AS IN ORIGINAL COPY

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RELEVANT DOCKET ENTRIES

The United States

vs.

Stanton Freeman, Kim Ornitz, Marlene Tombini, Francisco Rudge, Hermano Albuquerque and Rosalys Rudner.

Index No. 73 CR 633

Date

Proceedings

6/28/73

6/29/73

Floceedings

Before JUDD, J. - Indictment filed.

Before MISHLER, CH. J. - Case called - Defts and counsel present - Motion by deft ORNITZ for a reduction of bail - Motion granted - Bail reduced to \$50,000 personal bond with a \$5,000.00 cash deposit - Motion by deft FREEMAN for a reduction of bail - Bail modified to \$200,000 bond with a cash deposit of \$20,000

7/9/73

Before MISHLER, CH. J. - Case called - Defts FREEMAN, ORNITZ, TOMBINI, RUDGE and ALBUQUERQUE present with counsel - Deft RUDNER not present (fugitive) - Defts FREEMAN, ORNITZ, TOMBINI, RUDGE and ALBUQUERQUE arraigned and enter pleas of not guilty - Pre-trial conference and to set a date for trial set down for July 19, 1973 at 4:30 P.M. - Motion by defts ALBUQUERQUE and TOMBINI reduction of bail - Motion denied - Motion by deft RUDGE for reduction of bail denied

7/19/73

Before MISHLER, CH. J. - Case called - Pre-trial conference held - Deft TOMBINI severed from other defts and set down for trial on 9/10/73 All motion extended to Aug. 17, 1973 - Bail limits extended to Atlanta, Ga. as to deft FREEMAN.

Date Proceedings 8/10/73 Notice of motion for dismissal of indictment filed, ret. 8/17/73 (FREEMAN) Notice of motion for suppression filed, ret. 8/17/73 (FREEMAN) 8/17/73 Before Mishler, Ch. J. - Case called - adjd without date. (FREEMAN) 9/4/73 Before MISHLER, CH. J. - Case called - Deft Tombini and counsel present - Deft Tombini withdraws her plea of not guilty to count 4 and after being advised of her rights by the court and on her own behalf enters a plea of guilty to count 4 - Sentence set down for 9/14/73 - Pre-Sentence report waived (MARILENE TOMBINI) 9/5/73 Before MISHLER, CH. J. - Case called - Deft Rudge and Deft Albuquerque present with counsel -On motion of AUSA Fried indictments 73CR601 and 73CR633 are dismissed as to Deft Albuquerque - Deft Albuquerque discharged from custody - Designation as to Deft Rudge adjd to 9/10/73 9/10/73 Before Mishler, Ch. J. - Case called - defts FREEMAN, ORNITZ & RUDGE present with counsels - deft RUDGE withdraws his plea of not guilty to count 4 and after being advised of his rights by the court and on his own behalf enters a plea of guilty to count 4 - sentence adjd without date - Hearing on motion to suppress held - Decision Reserved on motion to suppress - hearing concluded - trial contd to 9-11-73 at 9:30 am

Stipulation filed that Defts Freeman and Ornitz voluntarily waive the

right to trial by jury

9/11/73

Proceedings Date Before MISHLER, CH. J. - Case called -9/11/73 Defts Freeman and Ornitz present with counsel - Trial resumed - Motion to suppress is denied as indicated on the record - Waiver of trial by jury signed by the defts and consented to by the Govt and approved by the court - Trial contd on 9/12/73 Before MISHLER, CH. J. - Case called -9/12/73 Defts present with attys - Trial resumed - Trial continued to 9-13-73 Before MISHLER, CH. J. - Case called -9/13/73 Defts Freeman and Ornitz and counsel present - Trial resumed - Govt rests -Motion by deft Ornitz for judgment of acquittal granted - Deft Ornitz discharged - Bail exonerated - Motion by Deft Freeman for a judgment of acquittal is denied - Trial to be contd on 9/17/73 9/14/73 Before MISHLER, CH. J. - Case called -Deft and counsel present - Deft sentenced to imprisonment for a period of 3 months on count 4 and a special parole term of 15 years (unsupervised) on the condition that the deft shall not remain in or reenter the U.S. or its territories or possessions during her parole term - On the motion of A.U.S.A. Fried counts 1, 2 and 3 are dismissed (TOMBINI) 9/17/73 Before Mishler, Ch. J. - Case called deft FREEMAN & counsel Myron Beldock present - Trial resumed - Trial contd to 9/18/73 Before MISHLER, CH. J. - Deft Freeman 9/18/73 and counsel present - Trial resumed -Deft rests - Trial concluded - Decision reserved - Deft to serve and

file brief by 9/24/73 - Govt's brief

by 9/26/73 (FREEMAN)

Date

10/5/73

1/4/74

Proceedings

By MISHLER, CH. J. - Memorandum of Decision and Findings of Fact filed as to deft STANTON FREEMAN. Deft is found guilty of counts 1, 2, 3 & 4.

Before MISHLER, CH. J. - Case called - The court found the deft FREEMAN guilty on cts. 1, 2, 3 and 4 after trial (see Court's decision) - Bail conditions cont'd - Sentence adjd without date.

Before MISHLER, CH. J. - Case called - Defts FREEMAN and RUDGE present with counsels - Deft FREEMAN's motion to dismiss the indictment, etc. is denied - deft sentenced to imprisonment for a period on each of counts 1, 2, 3, and 4 for a period of 2 years and special parole term of 5 years on each count - Said sentences to run concurrent - court advised deft of his right to appeal - Clerk to file notice of appeal with fee - Bail limits extended to the continental U.S. - Deft. to advise his counsel if he leaves N.Y. who will in turn advise the Court - Deft RUDGE sentenced to imprisonment on count 4 for a period of 5 years and a special parole term of 10 years - Special condition of special parole is that the deft is not to re-enter the U.S. or territories during his parole term. On motion of A.U.S.A. counts 1, 2, 3, are dismissed.

Judgments and Commitments filed - certified copies to Marshal (FREEMAN & RUDGE)

Notice of appeal filed (FREEMAN)

UNITED	STATES	DISTRI	CT	COURT
EASTERN	DISTRI	CT OF	NEW	YORK

UNITED STATES OF AMERICA

- against -

STANTON FREEMAN, KIM ORNITZ, MARILENE TOMBINI, FRANCISCO RUDGE, HERMANO ALBUQUERQUE and ROSALYS RUDNER,

Defendants.

THE GRAND JURY CHARGES:

SUPERSEDING INDICTMENT

Cr. No. 73 - 633 (T 18 USC \$2, T 21 USC \$841(a)(1), \$846, \$952(a), \$955, \$960(a)(1), \$960(a)(2) and \$963.)

COUNT ONE

On or about and between the 15th day of May 1973 and the 18th day of June 1973, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, STANTON FREEMAN, KIM ORNITZ, MARILENE TOMBINI, FRANCISCO RUDGE, HERMANO ALBUQUERQUE, and ROSALYS RUDNER, the defendants, together with others known and unknown to the Grand Jury, knowingly and intentionally did combine, conspire, confederate and agree together and with each other to violate \$841(a)(1), \$841(b)(1)(A), \$952(a), \$955, \$960(a)(1), \$960(a)(2), and \$960(b)(1) of Title 21, United States Code.

 It was part of said conspiracy that the defendants knowingly and intentionally would import into the United States from places outside thereof, a quantity of cocaine, a Schedule
II narcotic drug controlled substance.

- 2. It was further a part of said conspiracy that the defendants knowingly and intentionally would distribute and possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance.
- 3. It was further a part of said conspiracy that the defendants would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed within the Eastern District of New York and elsewhere:

OVERT ACTS

- (1) On or about the end of May 1973, the defendants MARILENE TOMBINI, FRANCISCO RUDGE, and HERMANO ALBUQUERQUE met in London, England.
- (2) On or about the 4th day of June 1973, the defendants FRANCISCO RUDGE, MARILENE TOMBINI, HERMANO ALBUQUERQUE, and ROSALYS RUDNER met in the Albert Hotel, New York, New York.
- (3) On or about the 18th day of June 1973 the defendants MARILENE TOMBINI and ROSALYS RUDNER travelled by airplane from Buenos Aires, Argentina to John F. Kennedy International Airport, Queens, New York.

(4) On or about the 18th day of June 1973, the defendants STANTON FREEMAN and KIM ORNITZ met in the Hotel Diplomat, New York, New York. (Title 21, United States Code, \$846 and \$963.)

COUNT TWO

On or about the 13th day of June 1973, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendants STANTON FREEMAN, KIM ORNITZ, MARILENE TOMBINI, FRANCISCO RUDGE, HERMANO ALBUQUERQUE, and ROSALYS RUDNER, did knowingly and intentionally import into the United States from Buenos Aires, Argentina approximately Five Pounds of Cocaine (5 lbs.), a Schedule II narcotic drug controlled substance. (Title 21 United States Code, §952(a) and §960(a)(1) and Title 18, United States Code, §2.)

COUNT THREE

On or about the 13th day of June 1973, within the Eastern District of New York, at John F. Kennedy International Airport, Jamaica, Queens, New York, the defendants STANTON FREEMAN, KIM ORNITZ, MARILENE TOMBINI, FRANCISCO RUDGE, HERMANO ALBUQUERQUE, and ROSALYS RUDNER, did knowingly and intentionally possess with intent to distribute approximately Five Pounds (5 lbs.) of Cocaine, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, \$841(a)(1) and Title 18, United States Code, \$2.)

COUNT FOUR

On or about the 13th day of June 1973, within the

Eastern District of New York, at John F. Kennedy International

Airport, Jamaica, Queens, New York, the defendants STANTON FREEMAN,

KIM ORNITZ, MARILENE TOMBINI, FRANCISCO RUDGE, HERMANO ALBUQUERQUE,

and ROSALYS RUDNER, did knowingly and intentionally possess approximately Five Pounds (5 lbs.) of Cocaine, a Schedule II narcotic

drug controlled substance, on board an aircraft then arriving in

the United States from Buenos Aires, Argentina, the aforementioned

Cocaine not being part of the cargo entered in the manifest, nor

part of the official supplies of said aircraft. (Title 21, United

States Code, §955, §960(a)(2) and Title 18, United States Code,

§2.)

2	UNITED SUATES DISTRICT COURT
3	EASTERN DISTRICT OF NEW YORK
4	x
5	UNITED STATES OF AMERICA,
6	-against-
7	STANTON FREEMAN, and
8	KIM OPNITZ,
9	Defendants. :
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12	United States Courthouse
13	Brooklyn, New York
14	September 10, 1973 19:00 o'clock A.M.
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17	Before:
	HONORABLE JACOB MISHLER, CHILL U.S.D.J.
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22	BURTON SULZER OFFICIAL COURT REPORTER
23	William Control Milliam Control

Appearances:

ROBERT A. MORSE, ESQ., United States Attorney for the Eastern District of New York

BY: BERNARD J. FRIED, ESQ., Assistant U.S. Attorney

PATRICK M. WALL, ESQ., Attorney for Defendant Ornitz

MYRON BELDOCK, ESQ., Attorney for the defendant Freeman.

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THE COURT: Both sides ready?

MR. BELDOCK: Yes, Judge.

THE COURT: Mr. Wall, of course, has

tried a case before me, at least one. Mr. Fried,
you have not. I know you have been before me
a number of times, but I don't believe you have
ever tried a case before me. In selecting a
jury, all peremptory challenges are made at the
Clerk's bench in the privacy of the Clerk's bench.
Don't announce your challenges in open court,
and don't announce that you are satisfied with
the jury, when you recognize that the jury is
satsifactory.

At that point, I will ask each lawyer to put it on the record.

I make the inquiry, but I allow the lawyers to inquire directly of the jury. That is atypical of this court, as you know.

MR. FRIED: May I interrupt you for a second?

THE COURT: Yes.

MR. FRIED: Before going -- on challenges, on the assumption that we have a joint trial beginning today, there has arisen in this case,

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a Bruton problem, and I want to bring it immediately to the Court's attention, because it is very relevant to the way that challenges will occur, as well as other things.

I should note that until about ten days ago, there were no statements made by the defendant, Mr. Freeman, nor the defendant, Mr. Ornitz, other than the initial remarks that were made at the time of the arrest, which in no way inculpated anybody or themselves --

MR. WALL: May I interrupt Mr. Fried briefly?

(Mr. Wall and Mr. Fried confer, off the record.)

MR. WALL: Thank you, your Honor.

MR. FRIED: Your Honor, initially, the defendant Stanton Freeman came into my office accompanied by his counsel and a lengthy discussion ensued at which time there was an agent present.

This was preparatory to the taking of a polygraph examination.

Subsequently, last Thursday, the defendant, Mr. Ornitz, also came to my office with his counsel and a lengthy discussion ensued, again preparatory

to the taking of a polygraph examination.

As a result of both of those statements, it was not until, in fact, Thursday late in the afternoon, that the final decision was made concerning what the Government's position would be in this case, and at that time, when I called your chambers on Friday morning, you had already gone to the Judicial Conference.

I see a Bruton problem insofar as certain remarks that were made by Mr. Freeman, which the Government would intend to use, in which he places allegedly the defendant, Mr. Ornitz at certain places, and also certain remarks that Mr. Ornitz made which may certainly be prejudicial against the interests of Mr. Freeman.

Therefore, I see no alternative but that the Government make a motion at this time for severance and to try the Freeman case first.

THE COURT: Is there any reason that you need these statements?

MR. FRIED: The statement by the --

THE COURT: I know they may be damaging, but if you feel you have enough, do you need that, do you need two trials?

MR. FRIED: I would not want to put the Government in a position of making that decision during the course of the trial, when it might become — it may be that those statements will become extremely important. There are certain admissions that were made by Mr. Freeman, for example, which, although not as against his co-defendant, the Government would seek to introduce in evidence.

MR. BELDOCK: May I be heard, your Honor?

First of all, I would ask that we table

this particular question --

THE COURT: Of course, in this District, there have been cases which I believe at first, indicated that where there are cross-inculpatory statements made that Bruton did not apply, but I am trying to recall the name of the case that last spoke on the problem.

MR. FRIED: A Supreme Court case?

THE COURT: Yes.

MR. FRIED: The Dutton case, your Honor?

THE COURT: How long ago?

MR. FRIED: Last March.

MR. WALL: Eighteen months, about.

THE COURT: Maybe that was it. I think

I even wrote on it, and I don't think the impression
that I got from the Second Circuit Court of Appeals
was correct, or whether their prediction was correct.

It is only where all you have is the cross-inculpatory statements that the Bruton problem still remains.

But if you have a case, and probably under Chapman, it is not material beyond a reasonable doubt, then both statements may be used. Of course, I am thinking of judicial economy and I am thinking of saving the Court's time. We have too many trials to think of more than one trial, where one trial will do.

MR. WALL: Talking of judicial economy, I am probably going to waive the jury, almost certainly, if Mr. Fried consents.

THE COURT: I didn't hear what you said.

MR. WALL: Talking about judicial economy, I would not want your Honor to think that a granting of a motion for a severance would case two jury trials, because I intend to apply for the waiver of a jury, and try this case before your Honor, if Mr. Fried approves.

THE COURT: Would you waive any Bruton

problem in a joint trial, or do you expect that

I would first try one, and then, if you see Mr. Freeman
is convicted, then you would ask me for a non-jury

trial?

MR. WALL: So that I am clear on it, my present intention was to apply for a waiver of a jury and to try this case before the Court.

THE COURT: Are you asking that it be a separate trial, or that it be a simultaneous trial, the trial against Freeman and the trial against Ornitz?

MR. WALL: That might depend to a certain extent, on Mr. Beldock's willingness to waive a jury, although I have asked other Courts to conduct a jury trial with just my client trying his case before the Judge.

I don't know of any Judge who has granted it, but it is certainly an interesting possibility.

THE COURT: Give me that again, it's Monday morning.

MR. WALL: I just wonder whether or not I knew what I just said.

I have asked on prior occasions, I may say

it's never been granted to me, but I see no reason why it shouldn't be, that in the course of a joint trial before a jury, that my client be tried non-jury, while the trial is going on, the jury deliberates on other defendants --

THE COURT: You have the right of crossexamination. We do it often on the civil side, that is why I just assume that we can do it on the criminal side.

Now you are giving me room for thought.

I would have to explain it to a jury.

MR. WALL: Every time I have asked for it, -THE COURT: It might be confusing, and I
see you are rocking on your heels and you are
wondering whether you would consent to it. I don't
think I would do it without consent. It may raise
problems. They may wonder why one is being tried
non-jury. Why don't they wonder in a civil trial?

MR. WALL: They probably do, but nobody cares.

THE COURT: I care, because we had a big discussion about jury trial at our Judicial conference and that was one of the questions.

I was the Chairman of one Workshop, and I asked

whether the same standards apply in civil trials as in criminal trials when we talk about jury trials, six-member juries and five-six verdict, and I think everyone thought -- most thought that there is a difference between a criminal trial and a civil trial. One is between private litigants, and really, what we are saying is that they can't settle their claims, and so we have to have someone else determine it.

But in the criminal trial, society is against the member of society, and the standards are to be different; it's not just the settlement of a private claim. At least, that's what I thought.

I don't think I would have a joint trial.

I think the impression you got from your other experiences were correct.

MR. WALL: The Judges thought I was a little odd, actually.

THE COURT: In asking for a joint trial?

MR. WALL: Asking for that type of arrangement.

THE COURT: You see, the problem is, if you sat in the back and did nothing, and if I excused

the jury and permitted cross-examination by you outside the hearing of the jury on those matters, then it might make some sense, but if you got up to cross examine as to matters that did not concern the case against the party that they were determining, then it might be confusing to them. It is difficult enough to separate evidence that requires connecting proof. I think it is too much to ask that they disregard testimony on the case that does not concern them.

You know, the rules of evidence, either practically, or legally, are different in non-jury trial than in a jury trial. Some Appellate Courts believe that the Trial Court can reject improper evidence, where jurors may not be able to. So we are a little more "liberal" in a non-jury trial.

I think what I would do is take the evidence in the jury trial, and then give you the right to add anything else. If you wanted to bring anybody back for cross-examination in the non-jury trial, then I would take it. I think that would be practical.

MR. BELDOCK: Judge Mishler, I suggest to you and to counsel, that all of this is premature

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and that before we get to serious consideration of the Bruton issue, or whether or not there is going to be a jury trial or sort of a joint trial, we have to have before your Honor, our motion to dismiss the indictment and the hearings on suppression of certain tangible evidence and on statements.

THE COURT: I think the first question is whether I should sever.

MR. BELDOCK: I think those hearings, in the interest of judicial economy, at least from my point of view, and the interest of all concerned, should be joint hearings.

THE COURT: Are you waiving any Bruton objection?

MR. BELDOCK: Not until I see what happens with the hearings. I might. As far as I am concerned, I believe that the testimony regarding the co-defendant, will be coincidental in all substantial respects with the testimony that my client would give. If my belief is correct, I would like to have that testimony come in either through the agents, or through the co-defendant.

THE COURT: This does not give you the

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opportunity for an examination before trial.

MR. BELDOCK: I don't connect them, your Honor. My belief is based upon my investigation and prior knowledge. I have spoken to everybody in the case.

THE COURT: If the Government says that what Mr. Ornitz testifies to -- I am sorry -- what the agent who heard Mr. Ornitz's admissions say, implicates Mr. Freeman, then a Bruton problem is presented. The only further inquiry is whether both statements implicated each other, and whether in that event, we don't have a case where it is beyond question that it is not prejudicial.

MR. FRIED: Your Honor, I should state that the statement, the admission by Mr. Ornitz, is in my opinion, much more damaging against Mr. Freeman than the statements that Mr. Freeman made against Mr. Ornitz. In other words, they don't track each other.

(Continued on next page.)

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THE COURT: If there is a question about it, i that is the opinion of the United States Attorney, I must accept it. Not I must, but I will.

MR. BELDOCK: I will ask Mr. Fried to state, through your Honor, whether he is talking about statements about this particular case.

THE COURT: I should hope so. I am not interested in any other.

MR. FRIED: I'm not sure I completely understand the request.

THE COURT: Is it admissible in evidence in this case?

MR. FRIED: The Government's position is that these statements are admissible in evidence in this case.

MR. BELDOCK: Let's leave it at that for now.

THE COURT: What would be interesting and might be the make-way argument in granting the motion, if there were a question, is the possibility of a non-jury trial. I know it should not in logic be, and everyone should be entitled

to a jury trial, and if we have three defendants, three jury trials, if we have four defendants, four, but you and I know that that is one of the problems we have. If I can avoid a second trial on the same indictment I certainly shall.

MR. BELDOCK: Your Honor, we have considered both a non-jury trial and a jury trial, and the only thing I am putting before your Honor now is that we are presently leaning towards a jury trial, but we are open-minded and I think that we should not be required to make that decision until after we have the hearings.

It does not have to do with discovery of things that we don't generally know.

THE COURT: You should know that I never bargain for, urge or request a non-jury trial.

Non-jury trials give me more work than a jury trial.

But do we have a question of the voluntariness of the statement of Mr. Freeman now?

MR. FRIED: Your Honor, the statement by Mr. Freeman was made under a stipulation

that anything he said would be admitted --

THE COURT: Would be?

MR. FRIED: Would be.

MR. BELDOCK: We are not talking about that statement.

MR. FRIED: As was the statement made by Mr. Ornitz, understipulation that anything in this discussion would be admitted against them, if the Government --

MR. BELDOCK: Could be used against them, assuming that it is admissible.

THE COURT: What you were saying by that stipulation is that you waive a challenge to the voluntariness of the statement?

MR. BELDOCK: Of the statements that we made to Mr. Fried and Mr. Freeman made in Mr. Fried's presence, yes.

To the prior statements that Mr.

Freeman supposedly made to the agent the day before his arrest and on the day of his arrest, no. We have a standard hearing on that question and we have a standard hearing for the suppression in regard to certain cocaine that was allegedly found in a bag seized on

June 18th, which was not the cocaine involved in the indictment, insofar as the five pounds as specified, and we also have a suppression hearing regarding certain tangible properties seized from Mr. Freeman at the time of --

THE COURT: Give me that slowly and in chronological order.

MR. BELDOCK: The first question before this Court should be, both chronologically and logically, the search and seizure of the so-called Rosaly Rudner baggage on June 18th.

THE COURT: June 18, 1973, search and seizure, Rosaly Rudner.

Where did that take place?

MR. BELDOCK: That took place someplace outside of the Hotel Paramount after the customs agents seized Mr. Davis, I don't know when.

MR. FRIED: Subsequent to the arrest of Mr. Davis.

THE COURT: Next you say a statement made by Mr. Freeman when?

MR. BELDOCK: The statements made by

Mr. Freeman on the same day following chronologically

shortly thereafter, to Mr. Levine, the customs agent, and whatever other agents were present.

THE COURT: Statements said to customs agent Levine. And then?

MR. BELDOCK: And then on June 19th there was a phone call between customs agent Jay Salvestro and Mr. Freeman. I think it was innocuous, however, I think I would include that as being next logically.

THE COURT: Agent Salvestro?

MR. LEVINE: Silvestro, S-i-l-v-e-s-t-r-o, your Honor. That was a telephone call.

MR. BELDOCK: A call from the agent to Mr. Freeman.

THE COURT: Then?

MR. BELDOCK: And then, as far as I know, there is nothing else until we get to the rest of Mr. Freeman on June 19th, at which time we have two issues: The statements that he made during the course of interrogation and the property contained on his person --

THE COURT: You are talking about a Miranda problem?

MR. BELDOCK: Yes.

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THE COURT: All right.

MR. BELDOCK: The property contained on his person and in a briefcase which he had with him.

THE COURT: Did he have the briefcase with him?

MR. BELDOCK: Yes.

THE COURT: At his side, you mean?

MR. BELDOCK: Yes.

THE COURT: So we have no Chimel problem, we just have a problem of the lawful arrest and whether the search and seizure were incident to it.

MR. BELDOCK: Part of the last thing that we are talking about is whether there was a lawful arrest. There was an arrest warrant, of course, and an affidavit, and we are going to claim, among other things, that the affidavit is insufficient on its face.

THE COURT: Maybe I can rule on that now.

MR. BELDOCK: I think it is more logical, if I may suggest, your Honor, that you take the motion to dismiss the indictment first, because in the context of that motion, you will get a

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feeling for our arguments, and it will enable you to more easily make the ruling on anything else that follows.

THE COURT: All right. I don't have a copy -- I have the Magistrate's file. This may be the affidavit. The affidavit by Michael Levine?

MR. FRIED: June 19, your Honor.

THE COURT: Sworn to June 19th. That is it?

MR. FRIED: Yes, your Honor.

THE COURT: I assume you have seen the affidavit by Mr. Levine?

MR. BELDOCK: Yes, your Honor.

Intrinsic to any argument I am going to make, your Honor, is the world of difference between the conspiracy to import the cocaine and the importation of the cocaine on June 13th when there was a seizure and anything that happened on June 18th. That will be intrinsic to my argument regarding the indictment and my argument throughout the case and my argument regarding various of the evidentiary and suppression motions.

THE COURT: For the enlightenment of all, both lawyers, and I see Mr. Katz and Mr. Moguleslu sitting in the courtroom, among other of my duties, I have ceremonial duties and I will have to suspend 11:30 because apparently we are installing a new tax collector for this district and he will be here at 11:30. So that may take 15 minutes.

I understand an emergency came up on
a matter that I decided on the civil side, the
Canarsie school case, and if we get started,
I may have to suspend at 4:30 and conduct a
hearing on that at that time. So you can schedule
your problems in accordance with that schedule.

Now, Mr. Beldock, you say the indictment is insufficient and should be dismissed?

MR. WALL: May the defendant sit down?
THE COURT: Surely. Please be seated.

MR. BELDOCK: Look at the face of the indictment, your Honor.

You will see that in count one, of course, the Government is charging a conspiracy and names all the parties, and then it proceeds to outline that it is a conspiracy to import

the cocaine and distribute and possess it, and to conceal the existence of the conspiracy.

Then they state overt acts, and I don't know whether the copy of the indictment before you has the same error that appears in mine, but before I proceed --

THE COURT: I have the original.

MR. BELDOCK: There was a typo in paragraph three of the overt acts which may or may not be corrected in the original, and that date should be the 13th day of June, not the 18th. I don't know what it says before your Honor, but on my copy it said the 18th.

THE COURT: I don't usually correct anything in any indictment.

MR. BELDOCK: May I ask your Honor what date is shown?

THE COURT: 18th.

MR. BELDOCK: Of course we all know, your Honor, despite the fact that the indictment is in error, that the date that they came in on the airplane is allegedly June 13th.

THE COURT: So you could not have been prejudiced in any way by that typo.

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MR. BELDOCK: Except for the fact --

THE COURT: It says, "On or about."

MR. BELDOCK: Yes. We could not be prejudiced by that, except for overt act number 4, which is the only act which mentions Mr. Freeman, speaks of the 18th day of June.

THE COURT: It says on or about the 18th day of June?

MR. BELDOCK: I am only pointing that out for explanation, your Honor. I would accept the fact that it is just a typo. The jury must have heard -- if you look at the minutes you will see that they spoke of June 13th.

THE COURT: I believe that that is correctable, if that is the correct word.

I wrote at length on the right of any court to correct an allegation in the indictment even with the consent of the parties, and I find it is extremely limited. I think you might correct a comma here and there, maybe a misspelled name where it is obvious as to who was intended, but the answer to most of these misstatements or typographical errors is go before

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the Grand Jury and get a new indictment. It is a pretty rigid, inflexible, illogical rule, but it's there. So I will leave it this way and I will say to the jury, "On or about the 18th day of June also includes the 13th day of June"; I would rather do it that way.

MR. BELDOCK: It's all right, Judge.
You will see that the only overt acts stated
regarding Mr. Freeman is a meeting with Mr.
Ornitz on the 18th day of June at the Hotel
Diplomat.

THE COURT: What you are saying is that the only overt act that mentions Mr. Freeman is overt act number 4. Of what significance is that?

MR. BELDOCK: If I may go ahead, I think you will see the significance, and I certainly think it would be better if I proceeded in this fashion.

If you look at count 2, 3 and 4, your Honor, you will find that in all instances the Government is speaking about the five pounds of cocaine which came in and was seized on June 13, 1973. It was on that date, for all

intents and purposes, real purposes, the cocaine having been seized, that the conspiracy was over. There was nothing that I know of, and there has been a great deal of exchange of evidence in this case, and information, and talk among people to disclose, nothing that I know of that could have gone before the Grand Jury that would be sufficient legal evidence to lead to an indictment for what happened on June 13th.

On June 18th, your Honor, as you will hear in the suppression hearing, a very, very modest amount of cocaine --

How much was that, Mr. Fried?

MR. FRIED: At this point it is one or two grams.

MR. BELDOCK: One or two grams of cocaine, which can in no way be connected with the cocaine in the five pound shipment, was found in the bags of Rosaly Rudner.

All the evidence concerning Mr. Freeman that could have gone before the Grand Jury would have to do with the events of June 18th and these bags. All the evidence that the

Grand Jury could have heard or that -- let's leave it at that, all the evidence the Grand Jury could have heard would have been speculative completely, would have to do with associations -- the fact that Mr. Freeman knew somebody or had been with somebody, would have been speculative completely regarding anything sufficient to lead to an indictment for the importation or anything to do with the June 13th shipment of five pounds.

Now, if your Honor examines the Grand
Jury minutes, as I think you should, and
permits us to examine them in furtherance
of argument, I think you will find that although
there may be things there that are speculative,
there may be some things that are pure association,
you will find nothing that connects with Freeman,
or, if I may say so, probably Mr. Ornitz,
with anything that happened on June 13 in
connection with that shipment nothing that will
tie them in with any plan, nothing. I don't even
think that the June 18th act should belong in
here because I think the conspiracy was over as
a matter of law on June 13th.

THE COURT: Do you have any authority for that? Are you saying that the mere fact of arrest terminates the conspiracy?

MR. BELDOCK: The fact of arrest and the seizure of the subject of the crime terminates the conspiracy, yes.

THE COURT: I can see where the seizure of the one gram could not possibly prove that five kilograms -- five pounds were seized when the five pounds were seized. That is obvious.

(continued on the next page.)

BS:pc take 1/3

MR. BELDOCK: You might have a separate crime, your Honor, you might, but you don't have a crime that leads to an indictment for the June 13th events, either for the conspiracy count or any of the substantive counts.

I can't conceive that there is any evidence in those Grand Jury minutes that would even raise sufficient speculation -- I am talking about speculation -- for the substantive counts of the five pounds.

THE COURT: The Government is not limited in any way by the Grand Jury proceedings. Manythings occur after the Grand Jury returns an indictment, and the Government does not have to produce all this evidence at the Grand Jury.

MR. BELDOCK: I am aware of that, Judge.

I am simply saying that on the face of the indictment there is only a mention of June 18th.

In fact, there was only June 18th regarding those bags, and the evidence before the Grand Jury would not have been sufficient no matter how you turn and twist to raise evidence for an indictment for events that happened on June 13th.

THE COURT: I have a .. re basic

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question to ask the United States Attorney, and only because it is fresh in my mind from last week's judicial conference. This was a discussion with Mr. Morse and he expressed no opinion on that, and I didn't ask him to, but all the others, the judges and the lawyers were in agreement that there is no reason to join for trial a conspiracy indictment and a substantive count indictment. In many cases it's unfair. As a matter of fact, where it is obvious that the proof will show that the defendant was only an aider and abettor, there is an additional reason for not joining the conspiracy count, and the additional reason being that the concept of conspiracy is difficult enough for the jury, but when the Judge has to charge on aiding and abetting and conspiracy, and then explain to the jury the difference between the two, when the Court can't understand the difference between the two, is most difficult.

You may very well check back with Mr. Morse and he may very well urge that you do this very thing. The only question is,

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whether that in any way limits the proof of the Government. And in answer to the lawyer who seemed to make the argument, I said not at all. He thought that psychologically the Court admitted less evidence where the conspiracy count is pleaded, than where it is not. I wasn't aware of it. It may be.

But the question here specifically is whether, first, the issue of the date of termination of the conspiracy should, as a matter of law, be fixed by the Court, to wit: June 13, to exclude all the activities of alleged co-conspirators from the case, and, two, whether, even if it is in the case, and whether it is a fact, as it usually is, one for the jury, where this is so disconnected from the activities of the conspiracy as to not be admissible.

How do you feel about it?

MR. FRIED: Your Honor, the evidence in this case has, in large measure, been disclosed. There has been extensive discovery proceedings. The Government's position is that primarily it is the acts that occurred insofar as the defendantsMr. Ornitz and Mr. Preeman

are concerned, subsequent to the 13th, which permitted inference backwards into the conspiracy and backwards into the entire transaction.

The cases, as I read them, and I didn't prepare any cases for the Court on this, are that it is a question of fact for the jury.

THE COURT: You don't have to argue that, that is usually so.

MR. FRIED: And that in this case it is not unfair or unduly oppressive to continue with the indictment as it is currently constituted.

MR. BELDOCK: If your Honor pleases,

THE COURT: At what point in the trial did you intend to introduce this proof?

MR. FRIED: I'm sorry, which proof?

THE COURT: At what point in the trial, early in the trial or toward the end of the Government's case?

MR. FRIED: At this point, the initial witnesses in the Government's case should cover the transactions of the 13th and before.

THE COURT: We are just talking about the seizure on June 18th of the one gram of --

MR. FRIED: Actually, it is more than one gram. There was a 2.7 gram sample and there was a five gram sample which makes -
MR. BELDOCK: .5.

MR. FRIED: Which makes it 3.2 grams.

There is also 7 grams of cocoa leaves seized from that suitcase.

MR. WALL: Your Honor, my recollection
-- I'm sorry, Mr. Fried.

MR. FRIED: I will just finish answering the Court's question.

I, in tracing it in chronological sequence, the evidence concerning what was in Rosaly Rudner's suitcases, will not come in until at least halfway through the Covernment's case, in a chronological presentation.

What was the relationship between the

-- as the Government says, between Rudner and
Freeman, did they have direct contact?

MR. FRIED: The Government has no evidence in fact, as far as we are aware, that there was no direct contact between Rudner

and Tambini and the defendants Freeman and

Ornitz -- we are talking about before the 13th.

There is evidence of direct contact with Rudner

after the 13th, there is no question about that.

You are talking about before the 13th?

MR. BELDOCK: Before the 13th, there will be no evidence of participation or knowledge from anyone.

MR. FRIED: I wouldn't go so far as to say that.

THE COURT: But there was direct contact after that?

MR. FRIED: There was direct contact
with Miss Rosalys Rudner, who still has not
been found, and the defendant Stanton Freeman,
on at least the 15th of June, and arguably through
the 18th, on the day of the seizure.

MR. BELDOCK: 15th and 16th.

THE COURT: I am going to reserve decision on that. I want to see how the case develops.

Don't offer that evidence before you advise the Court that you are about to do it.

MR. FRIED: That is the most important

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element.

MR. BELDOCK: They have no case otherwise.

MR. FRIED: Basically the Government's case is that.

THE COURT: I want to see how the proof of conspiracy develops.

MR. WALL: Excuse me, your Honor.

My recollection is in this court, maybe
the first or second appearance, there was a
representation made that a qualitative analysis
of the seized gram, or three grams from the
suitcases, as compared with the cocaine of the
five pounds seized in the luggage of Miss Tambini
was being made, and I wonder whether or not it
is not crucial to the Government's case to show
that there was a connection between the two
seizures. I don't think they can show that.

Absent that, your Honor, you have a different conspiracy.

THE COURT: They seized five pounds coming in, so that the 2.7 grams couldn't possibly be part of the 5 pounds, is that right?

MR. FRIED: I think Mr. Wall is referring to a different representation. At the time

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of the preliminary proceedings before this

Court, the Government was under the impression

that there was a sufficient amount seized on

June 18th, that through the use of a neutron

activation analysis test, or another type of

qualitative chemical analysis, it could be

established that the small amount and the large

amount came from a common source.

We have been informed by the Bureau

of Customs chemist -- drug enforcement

administration chemist, that the sample was too

small to permit such an analysis and in fact,

it has not been done.

THE COURT: What do you mean by the same source, the same lot or the same geographical area?

MR. FRIED: The same lot.

THE COURT: So somebody had five plus pounds someplace in La Paz, and that this five pounds came from the same place as this 2.7 grams?

MR. FRIED: Right.

That cannot be established.

I have so informed the counsel for the

defendants.

MR. BELDOCK: I don't have my notes in front of me, but there were two parts of that laboratory report on the June 18th cocaine and at least one part of it showed a purity that was one-tenth of a percentage point, or one-hundreth of a percentage point different than the June 13th lot, on top of the fact that they can't show a common source, it would seem to be of somewhat different quality.

MR. FRIED: I think that is, first of all, a question of evidence, but since it has been raised, referring to the two documents, the second shipment — one of the amounts had a purity of 98 percent mixed with an inorganic salt, and the first amount had a composite purity of 98 percent. The inference is that they are of the same purity.

I think that that is beyond the scope, the Government would argue, of this motion.

THE COURT: You tell me why the indictment should be dismissed. If I struck the --

MR. BELDOCK: If you struck the June 18th,

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there is nothing.

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THE COURT: That is not an insufficiency of the indictment. I may dismiss the indictment at the end of the Government's case, but that is different.

MR. BELDOCK: On the face of the indictment, Judge, you only know what you see. I am saying that on the face of the indictment, all you see about my client is the mention of the June 18th overt act.

I am saying beyond that that if your Honor were to examine the Grand Jury minutes, or reserve decision for now on that question, I think you would find there was nothing in the Grand Jury minutes that would be sufficient to cause an indictment of anything involving June 13th. There is no evidence of knowledge and participation prior to that date.

Your Honor will find, I suggest, as a matter of law, that the conspiracy involving the importation of the cocaine and distribution of the cocaine seized on June 13th was completed on that day and that no subsequent acts of Mr. Freeman with any of the co-conspirators

can connect him back to that conspiracy.

THE COURT: How about the statements made to the narcotics agents and the statements made to Mr. Fried?

MR. BELDOCK: We went in on the statements made to Mr. Fried. The statements were made by our choice, very extensively to the Government.

THE COURT: Doesn't that implicate --

MR. BELDOCK: It does not implicate him in any way in the June 13th importation. It tells what happens on June 18th and various other things, but there is nothing in those statements that would incriminate him and I am going to argue that they are not admissible for that ground. There is nothing in those statements that incriminates him. There is no admission there of involvement in the June 13th importation.

It is true we gave the Government a great deal of information the Government may not have been aware of.

THE COURT: Do the admissions implicate him in the possession by Rudner of the 2.7 grams?

MR. BELDOCK: It implicates him in having sent toget those bags -- that would be the suppression hearing -- of knowledge --

THE COURT: Might not that tie him into the conspiracy that extended to June 18? Don't we have a question of fact just based upon what he said?

MR. BELDOCK: It won't tie you into the conspiracy, unless there is proof that he had knowledge that the June 18th cocaine, was part of the pre-June 13 conspiracy.

THE COURT: You think it must be of the same lot, in order to tie him into the conspiracy?

MR. BELDOCK: I think that is a question,

Judge, that the Government may have to prove

that that particular cocaine was imported and

was part of the same scheme. We are only talking

about one crime, you know.

THE COURT: We are talking about a conspiracy --

MR. BELDOCK: On --

THE COURT: Read count one. On or about May 15, '73, to June 18 '73, to import cocaine, to distribute cocaine --

It doesn't say that the conspiracy was organized to import five pounds of cocaine on June 13. Don't you think that the relationship

that existed between Mr. Freeman and Miss Rudner on June 18, would be relative to that issue?

MR. BELDOCK: Not on the facts as I know them.

THE COURT: I don't know any of the facts,
I just asked a general question.

MR. BELDOCK: The only conspiracy that I have here, had to do with the importation on the person of Marilene Tambini --

THE COURT: I appreciate that. What you know is one side of the story and Mr. Fried knows the other side, and if there is a real issue on the existence of the conspiracy of June 18, then I must submit that to the jury. Date of termination is normally a fact question, and the arrest of one or more of the conspirators does not terminate the conspiracy.

I had a case where a conspirator continued the conspiracy to distill liquor -- alcohol while he was in jail, and he had conversations with his brother on how to continue to conduct it. So arrest in and of itself, does not terminate the conspiracy. It is a significant fact and the jury will have that.

MR. BELDOCK: I have nothing to add on that argument, Judge.

THE COURT: I am reserving the motion to sever only because Mr. Beldock thinks it important that I hear the motions to suppress before I rule on that.

I frankly don't see how I can keep the parties together, unless the defendants specifically waive any objections to the statements on Bruton grounds.

Suppose I can only continue this for about five minutes, and then I must suspend for the ceremony I told you about --

MR. WALL: It seems to me, your Honor, that it would be more practical to postpone the decision on the motion to sever, until we have joint hearings.

THE COURT: I say that is what I will do.

Do you object to the severance?

MR. WALL: I wouldn't object to the severance, especially in light of the fact that I want a non-jury trial, and I gather that Mr. Beldock wants a jury trial, so as a practical matter, I look forward to the severance with some relish.

THE COURT: You didn't want to come and try

this case today, anyway.

MR. WALL: I came back from vacation to try it, but I would be willing to go back down again.

THE COURT: I remember you said you had your son with you, and wanted a few more days.

MR. WALL: I still have him with me.

THE COURT: You may have it soon. On the June 19th telephone call with customs agent

J. Silvestro, the Government intends to offer the statements made by the defendant Freeman?

MR. FRIED: Your Honor, that is nothing incriminatory in that statement, it is merely a phone call made -- we intend, at this time, to offer it, but as Mr. Beldock knows, it is mainly a statement -- a phone call that was made by Mr. Silvestro, which was a tape recording of Mr. Freeman's voice, which was then exhibited to a witness -- that Mr. Beldock is aware of -- at the hotel, who subsequently did identify the voice as being that of the defendant, Stanton Freeman.

THE COURT: Do you intend to use another telephone call that is incriminatory, then?

MR. FRIED: I do not.

THE COURT: Will you then offer the, what we call the voiceprint of the phone call?

MR. FRIED: At this time, it becomes unnecessary, because Mr. Freeman has admitted making such a phone call -- unless there is some further requirement. Mr. Duarte will testify that he received a phone call from the man who he later listened to a tape of, being Mr. Stanton Freeman, unless Mr. Beldock wants that tape played for the purposes of the jury to know how he knows it.

MR. BELDOCK: If your Honor rules that
the Government can, on its direct case, introduce
Mr. Freeman's statements made in the course of
our conference, then it becomes unnecessary to
reach the question of that voice tape or that
telephone call.

I am in no way backing off from my
stipulction with Mr. Fried, but I am saying to your
Honor that my contention is that the statements
which Mr. Freeman made to the Government were
exculpatory, despite the fact that he gave much
information.

That is a question of fact.

THE COURT: Exculpatory statements are sometimes more damaging than inculpatory statements, so whenever a defendant contests the voluntariness of an exculpatory statement, I listen as carefully as when the claim is made as it is inculpatory.

MR. BELDOCK: I am not contesting the voluntariness of the statements that Mr. Freeman made in Mr. Fried's presence, with myself present. I am saying that my basic argument about the Government's attempt to --

THE COURT: May I have the date of those statements, so I can identify them?

MR. PRIED: Thursday, August --

MR. BELDOCK: Thursday, August 16th.

THE COURT: What do you say Mr. Freeman said, Mr. Fried?

MR. BELDOCK: We spoke for almost four hours.

MR. FRIED: Your Honor, at the time, Mr. Silvestro can testify to what was said.

THE COURT: For my purposes, what part of that conversation will you offer in evidence?

MR. FRIED: Certainly not the full four hours of it, but --

MR. BELDOCK: If your Honor pleases, I would -- I don't want to keep any information from your Honor, but there is just a possibility that your Honor will be the trial Judge without a jury -- that is still in issue -- and I think it is premature to go into this, because you may rule that certain aspects of that conversation you cannot hear, and if that is so, then I would rather not have you hear them now.

THE COURT: It doesn't matter.

MR. BELDOCK: It is not something we have to go into now. The only reason I got on the voice tape question at all, was, and I know it is supposed to be an innocuous phone call --

THE COURT: How else can I rule on this?

Incidentally, I don't know whether I would approve the waiver of a jury. But whenever there is a non-jury trial, the Judge reads all the 3500 material, he conducts hearings, and I might say that on occasion, on rare occasion, I have found the defendant not guilty where I have read everything about him, and in the most uncomplimentary language and terms.

But if there is any question in your mind

about the ability of the Court -- I won't embarrass you by saying about me, being able to do it, then don't waive the jury trial.

MR. BELDOCK: There is no question about that. If I waive the jury trial, I will want you to --

I can tell you that in a civil matter, I will never listen to negotiations on the settlement of a claim where I am going to be the Trial Judge in a non-jury case. There they talk about dollar value, and I was just wondering whether I could dismiss a complaint or give less than the defendant insurance company was ready to offer. So, in thosecases, I gave it to another Judge.

On the other hand, only recently, I know where a Judge tried a case non-jury, the defendant offered \$125,000, and after it was all over, he gave the plaintiff seventy five thousand dollars.

But I don't know whether I can do so, so I would rather not.

The point is that this has always bothered me, and we have some Appellate Court decisions, which

say if the Judge has read the Probation Report before the verdict or the plea, he should not sentence.

I just don't know why, because I always point out that we know much more about the defendant when we try a case non-jury than is ever in the Probation Report.

The 3500 material disclosed more, and that is on a plea -- sometimes during a non-jury trial, it is never turned over to a defendant.

I would have to hear that.

I will hear evidence that I may not consider admissible.

MR. BELDOCK: All I am suggesting, Judge,
I don't think it is appropriate now to go into
it. That was a four-hour conference. Then we
will start talking about it back and forth. I
don't say we shouldn't do it at some time or some
time soon, but it is not necessary for the hearings
you are about to conduct.

THE COURT: The point is, I like to conduct all my hearings before we pick a jury, and then try the case, but I must suspend at this time, because I am about to conduct a ceremony that

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should not take more than ten or fifteen minutes.

If any of you would like to be present at the ceremony, and have a good look at your tax collector, you are welcome to come into my chambers and do so.

I will suggest that we won't require a jury here until two o'clock, so those waiting around can be excused.

(Recess).

THE COURT: All right. You are going to offer the statement made on June 19 at the time of arrest?

MR. FRIED: Yes, your Honor.

THE COURT: All right, suppose you bring your witnesses in.

MR. FRIED: Before that, I am also going to offer the statement made by Stanton Freeman on June 18, prior to arrest.

THE COURT: That was the statement made to Customs Agent Levine?

MR. FRIED: That is correct.

MR. BELDOCK: It seems to me, your Honor, we should have just one hearing, because everything happened consecutively on June 18, and we should

start with the seizure of the bags.

THE COURT: There may be different agents involved, that's why I want to know who is coming first.

MR. FRIED: Mr. Levine can testify as to the statements made on both June 18 and on June 19.

THE COURT: All right. Call Mr. Levine. (Continued on next page.)

MR. FRIED: The Government calls Agent Michael Levine.

MICHAEL LEVINE, having been called as a witness, was duly sworn by the Clerk of the Court, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. FRIED:

O Mr. Levine, by whom are you employed?

A I am employed by the Justice Department, Drug Enforcement Administration.

For how long have you been so employed?

A I have been a Federal agent eight years, until July first I was a Customs Agent assigned to the Hard Narcotics Smuggling Unit. July first of this year.

Were you in the performance of your duties as a special agent of the Bureau of Customs on June 18th, 1973?

A Yes, I was.

On that day were you investigating an alleged importation of cocaine that had occurred on June 13 at Kennedy Mirport?

A Yes, I was.

On June 18th, 1973 did you have occasion to speak to the defendant, Stanton Freeman?

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conversation you're about to relate take place? A It took place in a rear office off the lobby of the hotel.

O Would you tell the Court, please, the purpose of

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2	your going to speak with Stanton Freeman at this time?
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9	Q What happened?
10	A Mr. Freeman spoke to this Mr. Davis
11	Q Were you present at this time?
12	A I was able to observe the two speaking from the lobby.
13	Q How far were you from where Mr. Davis and
14	Mr. Freeman were speaking?
15	A I was seated approximately fifteen, twenty feet away
16	from the doorway.
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18	Q Would you tell the Court what you saw and heard, if anything?
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20	- Savis speaking to Mr. Freeman. I was not
	able to hear anything.
21	Q And then subsequently to that what did you
22	then see?

A I saw Mr. Davis leave and I then went to the rear -the other end of the lobby where spoke to Mr. Davis and he told me that he was told by Mr. Freeman to leave the

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suitcases where they were.

Q Now, coming back -- on the basis of this information you went to speak to Mr. Freeman.

A After a few minutes I saw Mr. Freeman and two other individuals leave the office and walk past the suitcase which were under the desk clerk's counter. I saw Mr. Freeman point at the suitcase and speak to the other two individuals and then went out of my sight.

Q Yes.

A We then watched the suitcases for another five or ten minutes and it was my judgment that Mr. Freeman had somehow been warned. I was also told by Mr. Davis that possibly another individual by the name of Kim Ornitz might have seen the arrest and warned Mr. Freeman.

Q Then did you then go and speak with Mr. Freeman?

I then went --

THE COURT: Might have seen the arrest where?

THE WITNESS: The arrest of Mr. Davis on the street, on Broadway and approximately 44th Street, your Honor.

Q Just so the record is clear, will you tell the Court who Mr. Davis is?

A That's John Davis.

Q The person who was sent for the suitcase?

A That's correct.

You then had with Mr. Freeman, at which Mr. Silvestro was present, will you tell the Court where that took place?

A That took place in that — in the rear office off the lobby. We brought Mr. Davis back to the office, Special Agent Silvestro was there, Special Agent Joseph King, Special Agent Paul Boulard was there. At this time I read a statement of Constitutional rights warnings to Mr. Freeman and asked him if he understood.

Q Will you tell the Court what it was exactly that you read?

A I read from Document 5661 --

Q no you have a copy of that with you?

A Yes, I do.

Q Will you please read it to the Court?

Before we ask you any questions it is my duty to advise you of your rights. You have the right to remain silent.

Anything you say can be used against you in Court or other proceedings. You have the right to consult an attorney before making any statement or answering any question and you may have him present with you during the questioning. You may have an attorney appointed by the United States Magistrate or the

THE COURT: Albert Hotel?

THE WITNESS: Albert Hotel, your Honor.

Court to represent you if you cannot afford or otherwise obtain one. I should mention that on the card it says Commissioner, but at the time I stated "Magistrate," because there is no longer a Commissioner. If you decide to answer questions now with or without a lawyer you still have the right to stop the questioning at any time or to stop the questioning for the purpose of consulting a lawyer. However, you may waive the right to advice of counsel and your right to remain silent and you may answer questions or make a statement without consulting a lawyer, if you so desire. I then asked Mr. Freeman if he understood these rights.

Q What was Mr. Freeman's response?

He said yes, he did, that he had nothing to hide.

Q Will you tell us now as best you recall what it was that Mr. Freeman said, if anything, sir?

A I confronted Mr. Freeman with Mr. Davis and told
him that Mr. Davis said that you, meaning Mr. Freeman,
had just sent him to pick up these suitcases. We had
the suitcases in the room with us at this time. Mr. Freeman
stated that he had never seen Mr. Davis before in his life.
I asked Mr. Freeman if he knew anyone at the Albert Hotel.
He stated he didn't.

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MR. FRIED: A-1-b-e-r-t, your Honor.

I asked Mr. Freeman if he knew any Brazilians. He A stated that he knew no Brazilians. I showed Mr. Freeman photographs of the fugitive Rosalys Rudner. I believe there were four photographs.

> MR. FRIED: I would like this marked Hearing Exhibit Number one.

THE CLERK: Four photographs attached to a sheet of paper marked Government Exhibit 1 for identification.

Q I show you Government Exhibit number 1 for identification and ask you if you can recognize it? A These are the four photographs that I showed to Mr. Freeman.

> MR. FRIED: I would like to offer this at this time into evidence.

THE COURT: Show them to Mr. Beldock. You asked for a joint hearing. I don't know where you have any standing to object -- I am talking to Mr. Wall.

MR. WALL: I have no objection.

MR. BELDOCK: I have no objection.

THE COURT: Let them be marked.

THE CLERK: Government's Exhibit 1 previously

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marked for identification now marked in evidence. (So marked.)

Mr. Levine, would you please now tell us what the response was of this defendant, Stanton Freeman, when you showed him these four photographs?

He stated that he had never seen that woman before in his life.

Q Did you show him any other photographs during that meeting?

A Yes, I did. I also showed him photographs of the defendant Francisco Rudge and the defendant Herman Albuquerque.

> MR. FRIED: I request that these be marked Hearing Exhibit number 2.

> > THE WITNESS: And Marlena Tambini.

THE CLERK: Seven photographs marked Government's Exhibit 2 for identification.

(So marked.)

MR. FRIED: As I look at these photographs, I would like to once again show them to the witness.

O Mr. Levine, was this photograph of Mr. Davis--I showed him the photographs of the defendant Tambini, the defendant Albuquerque and the defendant Rudge.

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So of these photographs it's the three photographs in the right-hand side of the page and the three photographs -- and the photograph of Miss Tambini, the shorter photograph on top?

A That's correct.

Q And not the two photographs on the left-hand side, the two small photographs, nor the bottom photograph of Mr. Davis.

A I did show him another copy --

THE COURT: May we do this? It's in the vinyl envelope so why don't we -- leave them as they are unless you can take them out for the purposes of the hearing.

Will you mark an X in purple ink over the photograph you say you didn't show?

THE WITNESS: I did show another copy of these, which is on that other form, your Honor.

THE COURT: But you didn't show these?
THE WITNESS: No.

THE COURT: All right. So the witness marked an X over those photographs he didn't show to Mr. Freeman.

MR. WALL: No objection.

MR. FRIED: I would like to offer Government

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Exhibit 2 into evidence.

THE CLERK: Government Exhibit 2 previously marked for identification now marked in evidence. (So marked.)

Mr. Levine, will you tell the Court, please, what Mr. Freeman's response was when you showed him the photographs in Government Exhibit number 2?

A He stated that he had never seen these people before in his life.

Q At this time while you were speaking with Mr. Freeman, was there any other conversation?

A Not at that particular moment. I then ordered that the defendant Davis be taken downtown --

Q We're only concerned with the conversations that you had with Mr. Freeman.

Right. Mr. -- Special Agent Silvestro and I then asked the defendant, Mr. Freeman, if he would have a cup of coffee with us in the coffee shop. At that time in the coffee shop I told Mr. Freeman that it might be that he was doing somebody a favor and is afraid now, or for some other reason does not want to tell me the truth at this particular time. But that all we were interested in at that moment was the girl. That if he would tell me where the girl was, then we'd have to forget about him. But that if he didn't

tell me where the girl was and did know, he was making himself part of the crime. I then gave him my card, which gave a twenty-four hour phone number to reach me with and told him, should any information come to his mind to call me at any time and at that point we had no further conversations.

MR. FRIED: Your Honor, we can do this either of two ways --

THE COURT: No, get all the testimony of Mr. Levine as to all the issues involved.

- Mr. Levine, on the next day, the following day,
 June 19th, at approximately five P.M. was the defendant
 Stanton Freeman arrested by yourself and Customs Agent
 Joseph King on West4th Street in the vicinity of Curtis Street
 A That's correct.
- At this time can you tell us where he was physically located when he was placed under arrest by yourselves?
- A He was walking on West 4th Street.
- And can you tell us what if anything the defendant was carrying when you saw him on West Fourth Street?
- A He was carrying a briefcase.
 - Did you arrest him pursuant to a warrant that

was issued that day by the United States Magistrate, Lastern District of New York?

A Yes, I did.

Are you the same Michael Levine who swore an affidavit in obtaining such an arrest warrant?

A Yes, I did.

Q At this time did you say or do anything with respect to the defendant Stanton Freeman?

A Yes. I again read him a statement of his Constitutional rights.

Q Is this the same statement that you earlier read?

A That's correct.

Q You used exactly the same card?

A Same card; as is my habit.

(Continued on the next page.)

Levine-direct

MR. FRIED: If Mr. Beldock has no objection, for purposes of time we won't reread the statement.

MR. BELDOCK: No objection.

BY MR. FRIED:

Q Then can you tell us what next happened, if anything?

A We then took Mr. Freeman to 201 Varick Street for processing.

Q How did you take him to 201 Varick Street?

A We handcuffed him, placed him in the back seat of the government car and took him, drove him to 201 Varick Street in a government vehicle.

Q While you were in the vehicle did you discuss this case or ask him any questions, that you can recall?

A Not that I can recall.

Q When you arrived at 201 Varick Street, did -- is this the Customs Office?

A Yes, it is.

Q Customs Headquarters?

A Yes, it is.

Q Where did you go at that point?

A We went into a processing room where the fingerprinting and photographing equipment is.

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Q You said he was arrested at about five o'clock, is that correct?

A Offhand, I think it was in the late afternoon, early

Q About what time was this when you arrived?

A Right. So I would say approximately 5:30 we were at the office.

Q When you say he was processed, can you tell us basically what occurred?

A Well, he is fingerprinted, photographed, personal history statements are taken from him and a statement of alien, being that he is an alien being arrested, is taken from him.

Also, whatever property he had on him at the time of the arrest is gone through and inventoried. While going through his property --

Q Before we get to that, can you tell us about how long this took, this processing?

A This takes about an hour and a half, two hours.

Q During that time, was.Mr. Freeman permitted to use the bathroom or have a drink of water, if he requested?

A Yes.

Q This was at dinnertime. Do you recall whether

1 Levine-direct 64 2 or not Mr. Freeman had any supper that evening? 3 A I know Special Agent King went out and brought back 4 sandwiches, cokes, or what-have-you, for Mr. Freeman. 5 Q After you ate, did you then start to question 6 Mr. Stanton Freeman? 7 A I believe I first went through whatever he was 8 carrying. 9 Q Excuse me for a second. 10 When you advised him of his rights in the car, 11 what was his response to that advice? 12 I asked him if he understood. 13 Q Did he indicate he understood? 14 A He did. 15 Q Did he at that time indicate to you that he 16 didn't want to talk to you any further? 17 A He didn't say anything. He kept talking but exactly 18 about what, I can't recall at this time. I remember it was 19 immaterial to the case. 20 Q Did a time come during the period when he 21 indicated that he wanted to contact a lawyer? 22 A Yes. 23 Q Can you tell us precisely, as best you recall, 24 when that occurred?

A That occurred after I found certain things in his

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belongings.

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Refore he told you that he wanted to contact a lawyer, he was answering questions freely?

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A Yes, he was.

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MR. BELDOCK: I object to the character-

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ization, "freely."

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THE COURT: Strike it out. That is a

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conclusion.

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BY MR. FRIED:

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Q When you asked Mr. Freeman questions, did he respond without hesitation to you?

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A Yes, he did.

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MR. BELDOCK: Same objection.

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THE COURT: Strike it out.

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Did he answer your questions?

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THE WITNESS: He answered all my:

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questions.

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BY MR. FRIED:

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You said you found certain things on or about his person before -- it was as a result of those questions about these items that he asked you to call his lawyer; is that correct?

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That's correct.

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Q Can you tell us in a narrative form exactly

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what occurred in chronological order?

A In his briefcase I found an envelope with the name -not an envelope, a card, a folded card, with the name,
Terezinha Costa on the card.

I recognized that as being the same name that I knew Rosalys Rudner was receiving mail in care of.

MR. FRIED: At this point I would like to offer -- this is Hearing Exhibit number 3 for identification.

THE CLERK: Document marked Government's Exhibit 3 for identification.

(So marked.)

THE COURT: Is there any objection?

MR. WALL: No objection.

THE COURT: Let it be marked.

THE CLERK: Government's Exhibit 3

previously marked for identification now marked in evidence.

(So marked.)

BY MR. PRIED:

Were there any other documents or items at this point that you found on Mr. Freeman's person -- where was this item found, by the way?

This was in his briefcase.

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Q Were there any other items found?

A At that particular point, nothing else was found.

Q What then happened, if anything?

A I brought the card to Mr. Freeman's attention and I told him that in my opinion, this card was going to sink him.

Mr. Freeman said, "If you let me call my lawyer, I can explain this card."

Q Was Mr. Freeman allowed to call his attorney?

Q Can you tell us who he called?

Yes, he was.

A He called an attorney, William London, who is seated at the end of the defense table.

Q Did a period of time pass, during which you were waiting for Mr.London to arrive?

A Yes. During that period of time I telephoned you and asked you to come to the office.

And during this period of time did you have any conversation further about this case with the defendant?

A Yes, I did.

Before you had this conversation, after you knew that he had contacted his lawyer, were you told by him that he did not want you to question him any further?

A I did not question him any further. The rest of the conversation was just statements on his part. He just kept

stating	that	this	whole	thing	could	be	explained,	he	Just	aid
somebody	a fa	avor.								1

Q Then what happened?

A Then Mr. London and yourself arrived.

Q Can you tell the Court who arrived first?

A I believe Mr. London arrived first by about 15 or 20. minutes.

Q By the time Mr. London arrived, had you located other papers from Mr. Freeman's personal effects?

A Yes, I did.

MR. FRIED: I would like to introduce this as Hearing Exhibit number 4.

THE CLERK: Numerous papers marked Government's Exhibit 4 for identification.

(So marked.)

THE COURT: Do you intend to refer to any specifically?

MR. FRIED: Your Honor, he will refer to some of them specifically.

THE COURT: Then mark them with lettering, please. The entire exhibit will be called 4.

MR. FRIEDMAN: It might be simpler to introduce them as 4, 4 --

THE COURT: 4, 4-A, 4-B, 4-C, et cetera.

THE CLERK: Four documents marked

Government's Exhibit 4 through 4C inclusive,

for identification.

Three documents marked Government's Exhibit 4D for identification.

(so marked.)

MR. BELDOCK: No objection.

MR. FRIED: At this time I would like to offer --

THE COURT: Any objection?

MR. BELDOCK: No. Of course, when I say no objection, I mean only for this hearing.

THE COURT: Only for this hearing. All other objections are reserved.

THE CLERK: Government's Exhibits 4
through 4D inclusive, previously marked for
identification, are now marked in evidence.

(So marked.)

BY MR. FRIED:

Q Mr. Levine, I now show you Government's Exhibits 4 through 4D inclusive, which you previously identified as a series of documents that were taken from the person or the briefcase of Mr. Freeman incident to his arrest.

Would you continue your narrative of what . occurred that evening? You had just told us that Mr. Freeman had made certain disclaimers to you, and then Mr. London arrived.

A That's correct. Mr. Freeman was allowed to confer privately with Mr. London, and he did so for approximately half an hour, 45 minutes, after which Mr. Freeman made the following statement: that the way he got involve d in this was, he received a phone call from someone by the name of George, whom he knew and whom he knew was a Brazilian, asking him to refer him, meaning George, to an immigration lawyer for Terezinha Costa, who, to Mr. Freeman's knowledge, was the woman George was living with.

Mr. Freeman stated that George's last name, to the best of his knowledge, was George Simon. I asked Mr. Freeman if he had a phone number for George Simon, or the George that he was referring to, and he stated he did not.

I asked him if he knew where George lived. He stated he did not. I asked him how good friends were they, and he stated they were not good friends at all, that he had — the last time he had spoken to George was several months prior.

I asked him again if he is going to persist in stating that he had never seen this fugitive. He stated he

had never seen her before. I then confronted him with an envelope, that is, this envelope, Government's Exhibit 4, that I had found in his suitcase with the name, George, on it and a telephone number, 677-0100, extension 282.

I asked him if this was the George he was now referring to. He stated that it was. I asked him, then, why he had told me he didn't have a number to reach this George. He stated to me that this was an old phone number.

I then confronted him with the postmark on the envelope, which was May 19, 1973. He again stated that he was not sure, he was a little confused. We then looked the number up on the reverse telephone directory, and found it to be the phone number of the Albert Hotel.

That night, Mr. Freeman made no further statements.

- Did you show him that evening -- again, did you show him photographs of the fugitive, Rosalys Rudner?

 A Yes, I did.
- And these are the photographs that you earlier have identified and which are Hearing Exhibit number 1?

 A Yes, with the addition of others that were taken out of Miss Rudner's suitcase after the arrest of Jack Davis.
- The other documents, Mr. Levine, that we are referring to, that I have shown you and that are marked as Government's hxhibits 4A through 4D, inclusive, can you tell

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us precisely from what part of Mr. Freeman's person or belongings those came from?

A These other documents all came from Mr. Freeman's telephone book that was inside his suitcase, the little briefcase that he was carrying at the time that he was arrested.

> MR. FRIED: At this time, your Honor, I have covered the statements, as well as the evidence that was seized from the defendant, and the government would intend to introduce that.

> > THE COURT: Mr. Beldock?

MR. BELDOCK: Is that the government's entire case on the cocaine allegedly seized --

THE COURT: This is Mr. Levine's testimony.

MR. BELDOCK: He is not involved in that?

MR. FRIED: Are we going on to the --

MR. BELDOCK: I'm sorry, Mr. Fried. My understanding was that we were doing it all at once, and in chronological order, and you have skirted that issue.

If he is a witness, then I think he should give his testimony before I proceed. We

are also arguing --

THE COURT: We are talking about the search and seizure of the baggage allegedly owned by Rosalys Rudner. We are talking about the statements made, allegedly made at the time of arrest and the evidence seized at the time of arrest.

What other issue is there?

MR. FRIED: I have not covered the suitcases belonging to Rosalys Rudner.

MR. BELDOCK: That's my point.

THE COURT: All right.

BY MR. FRIED:

Q Mr. Levine, shifting your attention now to the day of June 18, 1973. You, I assume, on that day were engaged in your official duties?

A Yes, I was.

Q Had you learned earlier through investigation that a Rosalys Rudner had checked into Room 1815 of the Paramo nt Hotel?

A Yes, I had.

Q At that hotel and had that room in that hotel been placed under surveillance by yourself and other agents of the Bureau of Customs?

A Yes, it was.

Q On the morning of June 18, 1973, did you determine that the hotel had taken the bags out of the -over that weekend had taken the bags out of the room and placed them in their own offices, because of non-payment of bills?

A That's correct.

Q Can you tell us how you determined that? A By -- we had placed the room under surveillance on the 15th of June. and the 16th --

(continued on following page)

THE COURT: Where is the Paramount Hotel?

THE WIFNESS: That is on West 46th Street

in Manhattan, just east of Avenue of the

Americas, I believe.

We had placed the room under surveillance on the 15th and investigation at the hotel revealed that Miss Rudner had not paid any money in advance for the room.

I asked the manager, Mr. Steele, what the normal procedure was in the hotel in a case where someone comes in, leaves a bag there and doesn't pay the bill. Mr. Steels said that after a day, they usually would take the bag out of the room, store it in the hotel storage area pending the person's return, at which time they would have to pay their outstanding hotel bill to retrieve the bags. They kept the bags there until the 17th, at our request, and —

BY MR. FRIED:

Q When you say, "our request," you mean the Bureau of Customs --

A At our request, and by the 17th, Miss Rudner had not returned. At approximately 4:00 a.m., I think, on the 17th, I went to the room with a hotel security man, with the

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permission of the hotel, at which time the man opened the door, checked to see that the bags were still there. I at that time emptied the waste paper basket, took the contents of the waste paper basket with me and clipped the baggage stub off the bag and left.

The following day, I was told by the management that the bags had been placed in the hotel storage area, and that someone by the name of Davis had called and said that he would be at the hotel to pick up the bags. I then called you and informed you of these developments.

- Q Prior to calling myself, had you searched the bags or opened them up in any way?
- A No, I had not.
- Prior to going to the hotel that afternoon, had you sought a decision from the office of the United States Attorney of the Eastern District, whether a search warrant would be needed at that time?
- A Yes, I did. Earlier that day I came to your office, requesting your opinion as to whether we would need a search warrant or whether the permission of the management at the hotel to search the bag would suffice.
- Attorney's office of the Eastern District, did you and other agents go to the hotel?

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Q And do you recall the time of day that this

A I believe it was -- we got there approximately 1:30 or thereabouts.

Q And while you were at the hotel, when you arrived there, is this when the person told you of this phone call?

A' That's correct.

A Yes, we did.

Q Who was the person who told you of that phone call?

A Offhand I cannot recall his name. He was a desk clerk who told me he was at one time a Cuban detective.

Q Would that man be Ralph Duarte?

A I believe that's his name.

Q While he was there, did you then have to wait until somebody came to pick up the suitcase?

A Yes, we did.

Q Approximately how long did you wait?

Several hours. Three or four hours, we were waiting.

Q During this time, did you open the suitcases or search them?

We did not.

Q Then can you tell us what happened?

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Then an individual who I now know as John Davis -A

Q Is that John Spencer Davis?

A John Spencer Davis, appeared at the hotel, identified himself as John Spencer Davis, signed a paper stating that he was John Spencer Davis, paid Miss Rudner's hotel bill, took the bags and started walking down the street, that's West 46th Street, toward Broadway.

Q Then what happened, if anything, please? A Myself and other agents began following him. He walked about two or three blocks, crossed over to the other side of Broadway, at which time we thought that he might have detected surveillance, and at that time I arrested Mr. Davis.

As a result of this arrest, did you then go to Mr. Freeman's nightclub, as you earlier testified? A That's correct. It was Mr. Davis' statement that Mr. Freeman had sent him.

When did you first have an opportunity to search the inside of this suitcase that Mr. Davis had when you arrested him, or these suitcases?

A Later that evening was my first opportunity to search the bags.

Is that the first time that any agent of the Bureau of Customs searched these bags?

A That's correct.

Q And can you tell us, as you recall, what it was that was found inside of these suitcases?

A To the best of my recollection, it was a small quantity of cocaine, small quantity of coca leaves; there were numerous photographs, and the case and telephoto lens.

Q A camera case?

A Telephoto lens, just a case of telephoto lens.

Q Were there any other papers, such as checks and various other documents found inside of the suitcase?

A Yes, there were checks and other items, papers, et cetera. I believe by this time, also, we had pieced together some of the documents that we found in the waste paper basket.

Q This is the waste paper basket of the room in the Hotel Paramount?

A That's correct.

MR. FRIED: I have no further questions concerning the seizure on June 18.

THE COURT: Mr. Beldock.

MR. BELDOCK: Before I proceed, may I examine the memorandum the witness made, or any notes or reports of events he testified to, including, without limitation, any inventory he

made of the contents of Mr. Freeman's bag or

possessions he took from Mr. Freeman, any
notes regarding, or any reports regarding
the conversations with the various persons
that he has testified about.

THE COURT: Are you ready to turn them over?

MR. FRIED: Yes. I would like this marked as Exhibit 5. This is a report dealing with the arrest of John Spencer Davis, Stanton Freeman and Defendant Kim Ornitz, signed by Michael Levine, dated August 7, 1973.

I should note, your Honor, that the government has already provided to the defense counsel this morning grand jury minutes of the witness, MichaelLevine, concerning the statements that Mr. Freeman made, which were incorporated in those grand jury minutes, and those are grand jury minutes dated June 26, 1973.

I am not aware of any further inventory of her suitcase, other than what may be on the laboratory report --

Mr. Levine, was there an inventory made of the suitcase?

THE WITNESS: I believe he is referring to Stanton Freeman's --

MR. BELDOCK: Stanton Freeman's briefcase and the material that you took from Mr. Freeman, did you make an inventory?

THE WITNESS: I think the only inventory that we did put down was an address book and assorted papers, and that should be part of the arrest report.

BY MR. FRIED:

Q Was an inventory made of the suitcases belonging to Rosalys Rudner, what was inside of those?

An inventory was prepared. I think it was prepared
by Special Agent Silvestro.

MR. FRIED: I will check on that, your Honor.

THE CLERK: Four-page report marked Government's Exhibit 5 for identification.

(So marked.)

THE COURT: Have you seen it before?

MR. BELDOCK: I have not.

THE COURT: Suppose we suspend at this time and return at two o'clock.

MR. BELDOCK: I was going to suggest --

May I ask him a few preliminary questions on the subject of whether there are any other documents available?

THE COURT: All right.

CROSS-EXAMINATION

BY MR. BELDOCK:

Q From what did you prepare this report?

A From handwritten notes, other agents' statements and my recollection.

Where are the handwritten notes and other agents' statements?

A They were destroyed at the completion of that report.

Q You destroyed them?

A Yes.

You destroyed the other agents' notes, too?

A Well, the other agent, I don't know what he did with his notes. I said they were from statements of other agents.

MR. BELDOCK: I would ask the government if they are aware of any other contemporaneous or subsequently recreated notes or memoranda, especially in view of the fact that this witness destroyed his notes.

MR. FRIED: Your Honor, the only memorandum

or contemporaneous documents that I am presently aware of are the ones that Mr. Levine referred to, the document itself that he made, and, as I understand it, the other agents were basically debriefed orally by Mr. Levine, and that was incorporated into that report, which was signed by two agents, Mr. Levine and Mr. Silvestro, I believe.

BY MR. BELDOCK:

Q Whee did you prepare this report?

A That was prepared sometime in August. I'm not sure of the date.

Q It says August 7, 1973, on it?

Yes, thatis correct.

You had all those notes, your handwritten notes and the other agents' notes that you were aware of, up until August 7, 1973?

A Well --

Q You prepared the report and then destroyed the notes at that time?

A That is correct. And I did not have other agents' notes and I can, if your Honor will permit, explain the delay.

As of July 1, we were the Bureau of Customs and --

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this is purely a bureaucratic --

MR. FRIED: You mean, the Drug Enforcement Administration?

THE WITNESS: No, up until July 1, we were the Bureau of Customs, and the Bureau of Customs had its own reporting procedures, of which we could not avail ourselves any more after July 1. And this was one of the cases that we carried from the Bureau of Customs to the Drug Enforcement Administration.

Until that time that I prepared the report, it was not clear, within our own Bureau, what reporting methods we would use. So that is the reason for our delay.

BY MR. BELDOCK:

Have you shown the notes, the ones you destroyed had you shown them to Mr. Fried?

A I don't believe I did. I don't recall showing them to him. I know at various occasions I gave him information that he requested, but I don't recall showing him the notes.

Q In maintaining notes in this case, what did you do, did you have any memorandum book of any sort, or did you just put your notes on pieces of paper?

Paper, memorandum books, back of newspapers, at times.

When you testified before the grand jury, did you use the notes that you had made to refresh your recollection beforehand?

A I testified before the grand jury puzely from my recollection.

MR. BELDOCK: I think we can suspend now, your Honor.

MR. FRIED: I would like to put on the record the statement that I myself have never seen any notes that were prepared by an agent in this case.

All right. Two o'clock.

The Clerk said he has not marked the grand jury minutes. I would like everything turned over to defense counsel marked for identification.

MR. FRIED: Mark this Government's Exhibit number 6.

THE CLERK: Grand jury minutes of Michael Levine marked Government's Exhibit 6 for identification.

(So marked.)

MR. BELDOCK: Can I ask this question of Mr. Levine on the record? Does this report contain the entire record, aside from the notes

that were destroyed, of conversations with all of the people --

THE COURT: I won't allow that question in that form. Is this report the only written report that you made, Mr. Levine?

THE WITNESS: Yes, it is.

MR. FRIED: Your Honor, there is another report dealing with the transactions that took place prior to the June 18th occurrences.

MR. BELDOCK: I am only concerned about June 18th for the moment, I understand that.

There wouldn't be a statement of John

Davis written down someplace else, for example?

THE WITNESS: No. There was a report supposed to be prepared by Special Agent Silvestro concerning his investigation in re Mr. Duarte from the hotel. At the time I prepared that report, I was told by Special Agent Silvestro that he would prepare the report. At this time I do not know whether he has completed the report or not. I don't believe he has.

THE COURT: Does this report include the arrest of Miss Tambini and the seizure of the

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MR. FRIED: It does not.

THE COURT: So you have another report, a report made by you concerning the arrest of Miss Tambini?

THE WITNESS: No, your Honor.

THE COURT: All right, gentlemen.

THE WITNESS: There is a separate report --I'm sorry, I misunderstood. There is a separate report concerning the arrest of Miss Tambini, et all, Rudge, Albuquerque, which was treated as a separate report.

THE COURT: I see.

MR. FRIED: That has not been turned over, your Honor.

MR. BELDOCK: That was not what I was asking for. Only whether there were other reports or notes regarding the June 18th transaction. As example, I said, is there any memorandum of any sort concerning the questioning, the conversations with Jock Davis, aside from this report.

I take it Mr.Levine's answer is that this report contains everything that is still

extant during about that day?

THE COURT: I won't allow that question.

I will only allow you to ask him whether he made a report, not whether there is a report.

Someone else may have made a report.

Whether he made a report, you may ask whether he has knowledge of any other report concerning the same transaction.

THE WITNESS: As I stated, this is the only report that I prepared concerning Mr. Freeman's statements, et cetera, as of that date.

MR. BELDOCK: You are the agent in charge of the case?

THE WITNESS: Yes.

MR. BELDOCK: Do you know whether any other agent, government person, has made any other report, or has any other notes concerning that date?

THE WITNESS: Again, I repeat what I said about Agent Silvestro.

MR. BELDOCK: That he may have a report in process concerning Mr. Duarte, and that's all?

THE WITNESS: That's correct. As of two or

three days ago, we had no report.

THE COURT: You can check that out by two o'clock.

(Luncheon recess taken.)

AFTERNOON SESSION

THE COURT: Mr. Levine, will you please come up.

MICHAEL LEVINE, previously sworn, resumed the stand and testified further as follows:

THE COURT: Are we ready, Mr. Beldock?

MR. BELDOCK: Yes, your Honor.

MR. FRIED: Your Honor, prior to

Mr. Beldock commencing his examination, let me
represent that there are no other reports or
notes in existence concerning the circumstances --

THE COURT: Made by Mr. Levine, 3500 material?

MR. FRIED: That's correct.

CROSS EXAMINATION

BY MR. BELDOCK (CONTINUED):

Q You first put the Hotel Paramount under surveillance on what date?

A I believe it was the afternoon of the 15th, to the best of my recollection.

Q And you put it under surveillance because you learned that Rosalys Rudner had checked in there on

June 13, right?

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A I think she checked in there the morning of the 14th.

Q The 14th?

A Yes, I think so.

Q When you first went to the hotel you learned that Rosalys Rudner's bags were there?

A That is correct.

Q Those were two bags; is that right?

A That's correct.

Defore you learned about Rosalys Rudner's bags, am I right in saying that you had questioned Marilene Tambini, one of the co-defendants, and obtained a statement from her?

A Yes, sir; I had.

Had she told you in that statement that in Buenos Aires -- correct me if I have the wrong place -- Rosalys Rudner had turned over to Marilene Tambini two bags containing the cocaine which was to be imported?

A Yes, that's correct.

We have received a copy of the Tambini statement from the Government -- you know the one I am referring to?

A Yes.

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THE COURT: Suppose you mark that, since it has been identified. Mark it for identification.

MR. FRIED: I have the original, Mr. Beldock.

MR. BELDOCK: Thank you.

MR. FRIED: I request it be marked.

THE CLERK: Two-page statement marked

Government's Exhibit 7 for identification.

(So marked)

BY MR. BELDOCK:

You are familiar with the statement, are you not?

A Yes, I am.

Am I right in saying that as part of that statement, as I said before, Tambini told you that Rosalys brought two bags containing the cocaine with her when she came to the hotel room in Buenos Aires, and that thereafter those two bags were turned over by Rudner to Tambini?

A I believe that's correct.

And the two bags seized by the Government in Tambini's possession at the time of June 13 were the two bags that Rosalys had given to Tambini; is that right?

A I believe that's what Miss Tambini stated.

Q And there is nothing in anyting Miss Tambini

1 Levine - cross 2 stated in this statement about Rosalys Rudner's bags; is 3 there? I am not referring to the bags that Rudner turned 4 over to Tambini, you understand that? 5 A Yes. 6 Q Do you want to review it? 7 A That's o.k. 8 Q Am I right? 9 Yes, you are talking about the bags that were retriev-10 ed from the hotel? The bags that were taken on June 18, right. 11 A There is nothing in her statement, right. 12 Q On June 18, before you went to the Hotel Panama that day, had you heard the name Stan Freeman from anybody involved in this case? A No, I had not. Q Before you went to the hotel on June 18, you went to Mr. Fried's office to discuss the question whether or not you should obtain a search warrant to examine the contents of the Rudner bag; is that right? A You said the 18th?

Q Yes.

> A Yes, that's correct.

Q And as a result of that discussion Mr. Fried advised you that it was not necessary to obtain a search

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1	Levine - cross 93
2	warrant if the hotel, as part of its normal procedure,
3	were to open the bags; is that right?
4	A At his office, that's what his advice was, before
5	we got to the hotel.
6	So you went to the hotel with the intention
7	of examining the contents of the bag, with the permission
8	of the management?
9	A That is correct.
10	Q But you never did; is that right?
11	A That's correct.
12	You had been to the hotel, you say, about
13	4:00 a.m. the night before, June 17th; is that right?
14	Λ I believe it was June 17; that is correct.
15	Q Was that the first time you saw the bags?
16	A No, I had seen the bags the very first day we got
17	there.
18	Q In the room?
19	A I had looked into the room; that's correct.
20	Q So at 4:00 a.m. on June 17th am I right
21	as to the date?
22	A That's correct.
23	Q you went with the security man
24	A Yes.

a man named Phil?

1 I don't remember his name, but he is heavy set. 2 You went into the room with the permission of 3 the hotel management; is that right? That is correct. A 5 Q And you saw the bags there? 6 A That's correct. 7 Q What permission had the hotel management given 8 you, the right to go into the room with the security man? 9 That is correct, into --10 Q Who did you speak to? 11 A I spoke to a Mr. Steel the day before. 12 Q What did Mr. Steel tell you? 13 I questioned him as to the general procedure of the 14 hotel, and he stated that usually they would take the bags 15 out after one day, and I told him, well, at this point it 16 had already been several days, I said, "Well, if they don't 17 come by early the next morning, the 17th," I said, "take 18 the bags out." I said, "I'm going to go in with the 19 security guy, if it's o.k. with you," and I did. 20 And that's all to that part of the conver-Q 21 sation, correct? That's about it; that's about all I can recollect. 23 When you went in the room with the security 24

man, you saw a baggage check on the bag; is that right?

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were a lot of torn up letters and envelopes, torn up in little pieces. I emptied the contents of the wastepaper basket into an

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envelope, took the tickets, as I stated, and left.

THE COURT: Did you seize anything of value from the wastebasket?

THE WITNESS: We did seize a letter that we since pieced together, which will become pertinent in this trial.

O That is a letter that has no reference to Stan Freeman, in any event, is that right?

A That letter has no reference to Stan Freeman.

Q Let's go to the afternoon ot the 18th. About what time did you arrive at the hotel?

A I would say approximately, to the best of my recollection, 1:30 or so.

Do you have any notes at all regarding the time you arrived?

A No, I don't.

And what did you first do when you arrived?

A I believe when I arrived I was told by Mr. Steel

that he was about to -- he was looking to call me or he

was looking for my phone number, that somebody had called

and spoken to Mr. Duarte, the room clerk, about coming to

pick up the suitcases.

I was about to speak to Mr. Duarte -- I did

Q Have you searched your files and records to

1 Levine - bross 2 determine whether you have any notes about your conversation 3 with Mr. Duarte that day? 4 Yes, I did. 5 Q llave you found any? 6 Λ No, I have not. 7 Q Was anyone else present during that conversa-8 tion? 9 I believe Special Agent J. Sylvestro. 10 Q Have you spoken to him about whether or not he has kept or made any notes regarding the Duarte conver-11 sation? 12 13 I know he does not have any notes. 14 On direct examination by Mr. Fried you testi-15 fied that after you spoke to Mr. Steel and he told you that 16 someone, as you say now, someone had called to pick up the 17 bags, you then called Mr. Fried; is that right? I might have testified to that, but I recall now 18 that I never did call Mr. Fried; Mr. Fried called me at the 19 hotel. 20 21

Q Was that just after you spoke to Mr. Steel? I believe it was after I had spoken to both Mr. Steel and Mr. Duarte.

Q Are you sure you spoke to Mr. Duarte that day?

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	Levine - cross 99
	2 A Quite sure I spoke to Mr. Duarte.
	In your direct testimony you mentioned the
	name Davis having been given to you?
	A Yes.
	Q Then you said it was by Mr. Steel who gave i
;	to you; is that right or wrong?
8	A I don't believe that's correct. I think Mr. Steel
9	knew who called. He just told me that a clerk had received
10	a phone call. I believe it was Mr. Duarte.
11	Q Then after talking to Duarte, you say you
12	1 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2
13	and finally the man arrived who identified himself as Davis
14	is that right?
15	A That's correct.
16	Q This man came to the hotel, to your knowledge
17	A Yes.
18	Q Gave his name?
19	A Yes.
20	Q Gave a license when asked by Mr. Steel for
21	identification, right?
22	A That's correct, to my knowledge.
23	Q Paid the money for the bill?
24	A Yes, sir.
25	Q Signed a receipt or something, a piece of

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paper for the hotel indicating that he picked up the bags, right?

A Yes.

Was given a receipted bill or a receipt?
Yes, he was given a receipt.

Q Took the bags into his possession and walked out of the hotel; is that right?

A That is correct.

THE COURT: Did you have any information other than that supplied by Miss Tambini that Miss Rudner was engaged in drug trafficking?

THE WITNESS: We had information to the extent that when Miss Tambini was arrested she had some verifying data with her in that she had a hotel bill from Buenos Aires that indicated that Miss Rudner had in fact joined her in her room on the day before her arrival as she said.

THE COURT: Before Miss Tambini's arrest did you have any knowledge of Miss or Mrs.
Rudner's activities?

THE WITNESS: No, your Honor, not at all.

Before Jock Davis came to the hotel, did you have any information to the effect that there was contraband,

that is, cocaine, or any drugs in Miss Rudner's bags?

A No, we did not.

You say you followed Mr. Davis and he walked with the bags for several blocks, then he got over to the other side of Broadway, and then on direct you said at that time you arrested Mr. Davis?

A Yes, that's correct.

What happened? Did you go up to him and say, "Mr. Davis, you're under arrest"?

No. Mr. Davis appeared to be what we thought at the time, which I know differently now, signaling for a taxicab. We were out of position to follow him in the event that he got in the taxicab, so I had to put on the siren and cross over a divider on Broadway to put him under arrest before he could do so.

Q Did you get out and the other agents get out?

A Yes, sir.

Q Did you have weapons drawn?

A No, we did not.

O Did you say to him who you were?

A Yes.

And did you say, "You're under arrest, Mr. Davis," or words to that effect?

A Yes.

What did you say he was being arrested for?

We told him that he was being arrested for conspiracy to smuggle narcotics, I believe.

Have you ever heard the name Jock, John Spencer Davis, before that day, before you came to the hotel that day?

A No, I had not.

Did you then have any other information -Withdrawn. Did you then have any information at the time
you arrested him about Mr. Davis, except for the fact that
you told us he came and picked up the bags and he was
walking off with them?

A The only information we had is as I testified, that we were expecting Mr. Davis, and a Mr. Davis showed up.

THE COURT: The hotel manager told you it was a Mr. Davis that was coming?

THE WITNESS: Not the hotel manager,

your Honor.

THE COURT: Somebody else?

THE WITNESS: The hotel clerk stated a Mr. Davis.

Are you sure he said a Mr. Davis, or did he say a David, or are you sure he said that at all?

A Right now I'm very sure, because Mr. Fried had it in

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- Q Aside from Mr. Fried's notes, how about your notes?
- A No. As I said, I had no notes. I could find no notes now as to the identity of the caller.
- Q If I understand your direct testimony correctly, when you arrested Mr. Davis you had some conversation with him, and he gave some sort of a story which you didn't believe; is that right?
- A At that time I didn't believe anything that Mr. Davis said.
- You didn't open the bags then and search them, did you?
- A No, we did not.

Government vehicle.

- A I believe the bags were placed in the trunk of my
- Q And locked, I take it?
- 20 A Yes, sir.
 - Q And they remained there, according to your testimony, till sometime early that night?
- 23 A No, later that afternoon Special Agent Sylvestro -24 No, that is incorrect.
 - Q They were taken out and taken to the Hotel

'		Levine - cross 10	4
2	Diplom	at; is that right?	
3	A	Yes, that's correct.	
4		Q But no one looked in the bags at that time	?
5	A	No one looked in the bags is correct.	
6		Ω And as a matter of fact, you are the first	
7	person	who looked in those bags?	
8	A	I believe it was sort of a joint effort. We had	tw
9	bags a	nd several agents searching both bags.	
10		Q That was later that night?	
11	A	Yes, sir.	
12		Q About what time?	
13	A	Well, perhaps 7:00, 7:30; I'm not quite sure.	
4		Q It was after you had sent Mr. Davis downton	m
15	A	Yes, sir.	
16		Q It was after you were through talking to M	c.
17	Freeman	n?	
18	A	Yes, sir.	
9		Q Where did you examine the bags?	
0	A	At 201 Varick Street.	
1		Q In the course of your conversation with	
2	Mr. Dav	vis, before you went to the Hotel Diplomat?	
3	A	Yes, sir.	
4		Q From your testimony and your report, I take	

Mr. Davis finally said to you, "Well, Mr. Freeman sent me

to get those bags"! is that right?

- That's correct.
- O Do you have any notes of your conversation with Davis, aside from what is in the report?
- I have no notes of it, no, sir.
- O At that time, am I right in saying that's all Mr. Davis told you about the bags?
- At that particular time?
 - Q That's right.
- A He told me about the facts about himself and a Mr. Kim Ornitz, and that this Kim Ornitz had suggested that they all go and see Stan Freeman.

(Continued on the next page.)

M 1	Levine - cross 10
2	THE COURT: Did you have any information
3	on Ornitz before speaking with Mr. Davis?
4	THE WITNESS: No, sir.
5	THE COURT: First time you heard about
6	him?
7	THE WITNESS: That's the first time that
8	I heard about Ornitz, and that this man Freeman
9	had told them that they had a girl ready to get
10	out of town.
11	Q I'm asking about the
12	A He asked me
13	Q Incidentally, where are your notes on that
14	comment you just made, the girl ready to get out of town
15	Where are the notes?
16	A I have no notes.
17	Q Is there anything in this report to that
18	effect?
19	A May I see that report?
20	Q Yes.
21	A No, not in this report.
22	Q In what report?
22	A There are There is nothing in any report

THE COURT: Did Mr. Davis say anything

concerning that.

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else about his familiarity with any of the participants in the alleged conspiracy?

THE WITNESS: The only thing Mr. Davis told us about was confined to what had happened just immediately, the hour before, your Honor.

- Where were you questioning Mr. Davis on June 18, 1973? Do you understand? I am talking about before you went to the Hotel Diplomat.
- A In a car, in a Government vehicle.
- Q From the time of the arrest to the time you went to the Hotel Diplomat, about how much time passed?

 A Approximately twenty minutes or so.
- Q Mr. Davis tell you that he had never met Stan Freeman before that day?
- A He did state that he had never heard of Stan Freeman before that day.
- Q Did Mr. Davis tell you that he came into New York City that afternoon, at that time?
- A Mr. Davis said that he telephoned --
- Did Mr. Davis tell you as you were questioning him in the car that he had come into New York City that afternoon from out of state?
- A That's correct.
 - Q Did he tell you about what time he came into

over the days before about this case, right?

I was in contact with Mr. Fried when I felt I needed

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Q Earlier that day you had gone to Mr. Fried and had a conference with him in his office about the

question of whether or not you needed a search warrant to look into those bags; isn't that right?

a decision on his part as to --

A That's correct.

Q And Mr. Fried told you that the hotel in its normal practice would open those bags, and you didn't need a search warrant; is that right?

A That's approximately correct.

Q And did you understand from Mr. Fried that otherwise you would have had to have a search warrant?

A Repeat that.

Q Did you understand from Mr. Fried that otherwise, without the hotel's permission --

MR. FRIED: Your Honor, the issue --

Q -- you would have to have a search warrant?

MR. FRIED: This is beyond the scope of
the hearing.

THE COURT: May I have the question again, please?

(Record read)

THE COURT: Objection sustained.

Ω After you talked to Davis, you went to the

1	Levine - cross 110
2	Hotel Diplomat with him, and I take it directed that he go
3	speak to Mr. Freeman; is that right?
4	A I didn't quite hear you. Can you repeat that?
5	Q Did you tell Mr. Davis at the Hotel Diplomat
6	to go speak to Mr. Freeman?
7	A I told I asked Mr. Davis what instructions he had,
8	and
9	Q I'm asking you whether you told Mr. Davis
10	when you got to the Motel Diplomat or before that to go
11	find Mr. Freeman and speak to him.
12	A I told him to act as he would have had he not been
13	caught.
14	Q And what he had told you, according to your
15	report and testimony, is that Mr. Freeman had instructed him
16	to pick up the bags; is that right?
17	A That is correct.
18	Q Did he also tell you that Mr. Freeman had
19	given him the money to pick up the bags?
20	A Yes, he did.
21	Q When Davis got to the Hotel Diplomat, on
22	direct you said that he had a discussion that you couldn't
23	hear, with Mr. Freeman. Was that a very short discussion,

It was a matter of twenty seconds, thirty seconds.

a matter of seconds?

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Q And then after Davis walked away, he told you that Freeman said to him to leave the suitcases where they were?

A Yes, sir.

And there came a point where you were questioning Mr. Freeman. What's the first thing that happened when
you came up to Mr. Freeman?

A I believe Mr. Freeman first was located downstairs in a nightclub. We identified ourselves and said, "We'd like to speak with you."

He said, "Well, would you mind coming upstairs to my office?"

We said, "By all means," and we all went upstairs.

Q He was working with someone at that time and asked you to wait; right? A florist?

I don't know what he was doing.

Q And then what happened?

A We went upstairs.

Q You and Freeman and who else?

A Myself, Freeman, Special Agent Sylvestro, two -two people that had been with Freeman downstairs, one of
which we had seen sitting in the lobby at the time of the
attempted delivery of the suitcase. At this time I don't

recall their names. Both of them were present. Special Agent --

THE COURT: Excuse me. May I hear that, Mr. Rudolph.

(Record read)

A (Continuing) -- and Special Agent Joseph King,

Special Agent Paul Boulard was in and out during the conversation.

THE COURT: You say you saw someone at Mr. Freeman's place of business whom you also saw sitting in the lobby at the time of the attempted delivery of the suitcases?

THE WITNESS: That's correct, your Honor.
While --

THE COURT: What did he look like?

THE WITNESS: He was a short, slim built fellow. I have, or had his name written down somewhere. I don't believe I can locate it.

I was looking for it. He has brown hair.

I'd say he is in his middle twenties. He was seated at one of the sofas in the lobby when we were attempting to make the delivery.

THE COURT: Where did you see Mr. Freeman? In the night club, you say?

THE WITNESS: I saw him -- While the attempted delivery was going on, I saw this man enter the office first and then I saw him leave with Freeman and another individual and go downstairs, where we subsequently found Freeman and the same two individuals, downstairs.

THE COURT: That was prior to the arrest?

THE WITNESS: Yes, sir. That was prior to the arrest.

MR. BELDOCK: It was after the arrest of Davis, your Honor, and the day before the arrest of Freeman.

THE COURT: I understand.

MR. BELDOCK: The day before.

THE COURT: Go ahead.

BY MR. BELDOCK:

Q There came a point where you started to talk to Mr. Freeman when you went downstairs; right?

Yes, that's correct.

Q What's the first thing that you said to him?

A I believe I said, "I'm Special Agent Mike Levine
with the Bureau of Customs. I'd like to speak to you."

And he said something to the effect that,
"Sure, but would you mind going upstairs, you know, or

waiting a few minutes." I'm not sure whether we waited a few minutes or not. We might have waited a few minutes, and then we all went upstairs.

Ω Then when you got upstairs, what did you say to him, and what did he say to you?

A I --

Q Excuse me. This questioning was being conducted by you; right?

A That's correct.

Q With the other agents that you mentioned present; is that right?

A That is correct.

Q Please proceed.

A I read him a statement of his constitutional rights.

I asked him if he understood. He stated that he had nothing to hide, he understood.

Q Then what? What happened next? Specifically after that point.

A Specifically, I brought -- I had them bring Jack
Davis in and I told him that "This man says that you -you sent him to the Paramount HOtel to pick up these bags."
At that point somebody had brought the bags in also.

Q Did you tell Mr. Freeman anything else than about Mr. Davis, just at that point?

	Levine - cross 115
	A I don't recall.
	Q Did you tell him Mr. Davis was under arrest?
	A Oh, yes.
	5 Q You did?
(A Well, Mr. Davis was in handcuffs. So if I didn't,
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8	THE COURT: When Tambini was arrested,
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11	THE WITNESS: When Tambini was arrested,
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13	THE COURT: Yes.
14	THE WITNESS: Miss Tambini said that she
15	didn't know whether Rutner had observed it or
16	not.
17	THE COURT: Well, did Tambini tell you
18	that Rudner had come back in the plane with her?
19	THE WITNESS: Yes, she did, your Honor.
20	THE COURT: Was Rudner found on the
21	passenger list of the carrier that came in?
22	THE WITNESS: Yes, she was, your Honor.
23	She her baggage declaration was also found.
24	Her baggage ticket that was taken at the hotel
25	was the next number in sequence from the two

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A Yes, certainly did.

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You say you showed Mr. Freeman a photograph

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of Rosalys Rudner; in fact, four photographs?

A Yes.

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Q He said he never had seen that woman before in his life?

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A That's correct.

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Q You showed him other photographs of other people; right?

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A Yes.

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And that there was no other conversation at that moment? That's your direct testimony; is that right?

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A No. He also stated how -- in what order I can't

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recall, but he also stated he knew no Brazilians and he knew no one at the Alpert Hotel.

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With those additions, or if we forgot it between us now, anything you said on the direct, that was

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the entire conversation between you and Mr. Freeman at that

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time?

A We then went into --

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Yes, before you went into the coffee shop.

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A As I recollect at this moment, that's the sum and substance of it.

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There is nothing else in your report except what I brought out about you speaking of seeing Davis earlier and seeing Ornitz earlier?

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I don't think so. A

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Q After you ordered Davis taken downstairs, you and Silvestro and Freeman went in the coffee shop?

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That is correct.

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Q And you said to Mr. Freeman what? Repeat it

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for me, please. In essence, that I discussed with him the possibility

that he might be doing something as a favor for someone and not know the extent of difficulties he's getting into and that all we were interested in was the girl who is a narcotics smuggler and that if he would tell me where she is right now, we would forget about him, and that if he does know where she is and if he persists in hiding her, or in any way helping her, he's making himself part of the crime.

I can't remember the exact words, but in essence I was trying to give him an opportunity to tell me where the girl was and clear himself out.

(Continued on the next page.)

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When you told that version of that conversation on direct, you left out the words that you now had, that you told Freeman then that you all -- your interest --Withdrawn. That sentence is garbled.

On direct you said you said to Freeman all you were interested in then was the girl and if he knew her, if he knew and told what he knew, that would be all.

On direct you did not mention the words "narcotics smuggler."

Is it now your recollection that you said to him, "narcotics smuggler"?

A I'm quite sure I did tell him that it's a narcotics smuggling case.

Is there anything in your report about the discussion that you are now telling the Court about, anything at all about the discussion in the coffee house or anything you just told the Court about?

A I don't believe there is.

Q Look at it.

I know there is --

Q There isn't; right?

A There is not.

Q Did you have notes of that conversation?

A No, I do not.

Q Did you have notes of that conversation?

A Again, I don't recall whether I did take notes at the time. I usually do, but I do not have those notes at this present time.

Q Is there anything in the notes that you destroyed that's not in this report? Anything at all?

A Repeat that.

You said that you made this report from notes that you had on various pieces of paper, and you then destroyed the notes. I want to know whether there is anything that were contained within those notes that you don't have in this report.

A It's impossible to say. I don't have the notes now.

I really -- Just impossible for me to say.

Was your purpose in making this report to record all the important things that had happened in the case and all the important things that you had learned from conversations with people in your investigations?

A No, my purpose in making that report was purely a bureaucratic one, in that it's -- it's a format, a requirement with my job.

I believe I could have testified in this case totally from memory.

Ω The report says "8/7/73," August 7, '73.

1	Levine - cross 121
2	That's actually the date of the report, that it was typed?
3	A I really don't recall. We have a We now have a
4	Dictaphone system. The date I made the report might have
5	been a week or so earlier.
6	THE COURT: Is it indicated on the report?
7	Q That's your handwriting over there, "8/7/73"
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10	Q What does it say on the lower left hand, the
11	Can I see the original of that report,
12	Mr. Fried?
13	A That's the date that the secretary typed it.
14	Q Typed it, right?
15	A Yes, siTUE C
16	THE COURT: When did you dictate it?
17	Q That's August 14th?
18	THE COURT: When did you dictate it?
19	A No, this is August 7th. That was
20	Q What's this one here?
21	A That I don't know; I have no idea what that is.
22	Q August 14th, o.k.?
23	A O.K.
24	MR. BELDOCK: Can we see the original?

THE COURT: Can you tell from the report

when you dictated it?

THE WITNESS: Unfortunately, it's impossible. It's dictated on a Dictaphone and it's left for the secretary to do. Sometimes she takes a week, sometimes two weeks. It's -There is really no control. It should be different --

MR.FREID: Mr. Levine, I believe -Is your original admissible? I don't have
the original report. Is the original of this
report in here?

THE WITNESS: The original of that report is in the file.

THE COURT: Did you make the report after you testified before the grand jury?

THE WITNESS: I really don't recall whether

BY MR. BELDOCK:

Q You testified before the grand jury June 26, 1973; is that right?

A Yes, I believe it was probably after.

I did or didn't, your Honor.

MR. BELDOCK: Have you been able to

locate the original?

MR. FRIED: Mr. Levine --

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THE WITNESS: The original again -I have to apologize to the Court; it is in our
files at 555 West 57th Street.

MR. BELDOCK: Would you produce it, please. Your Honor --

MR. FRIED: It will be here tomorrow.

MR. BELDOCK: Thank you.

BY MR. BELDOCK:

Now, by June 19, you had obtained an arrest warrant for Stan Freeman and pursuant to that warrant you went to arrest him; is that right?

A That's correct.

Now, in order to get the arrest warrant you prepared an affidavit, sworn to June 19?

A That is correct.

And you appeared before a magistrate and submitted the affidavit, or counsel did it for you, and that's the background for the warrant; is that right?

A That's approximately correct.

MR. BELDOCK: Mr. Fried, do you have the warrant itself?

THE COURT: Here it is.

MR. BELDOCK: Thank you, Judge.

Your Honor, to simplify the proceeding

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I'll offer, or rather ask that the originals be deemed marked in evidence for the purpose of this hearing, both warrant and affidavit.

THE COURT: And the affidavit?

MR. BELDOCK: Yes, sir.

THE COURT: Please mark the affidavit and the warrant. Mark it a defendants' exhibit.

THE CLERK: Warrant and affidavit marked Defendant Freeman's Exhibit A for identification.

(So marked)

BY MR. BELDOCK:

Q At what time on June 19 did you obtain this warrant?

- A I'm really not sure. I think it was in the afternoon.
- Were you having Mr. Freeman followed by any government agents subsequent to June 18th, the events at the Motel Diplomat?
- A Subsequent to --
 - Q The June 18th events.
- A The June 18 events, no.
- I notice that on the first page of this affidavit of yours, the original typing of all the names of the co-conspirators or the defendants didn't include the defendant Stanton Freeman, and somebody wrote it in

afterward. Is that your handwriting?

A That's not in my handwriting.

Q Do you know when this affidavit was prepared?

A It had to be prepared on the 19th. When exactly, I don't know.

O.K. This is an affidavit in support of a search -- pardon me -- an affidavit in support of an arrest warrant for both Stanton Freeman and John Spencer Davis; is that right?

A May I see it?

(Continued on the next page.)

MP 3/1 2

MR. FRIED: Your Honor, may I first
point out that this is an affidavit in support
of an arrest warrant against the defendant
Stanton Freeman. The defendant John Spencer
Davis has been arrested, and there was an
affidavit for the complaint as well.

Secondly, let me straighten out that it was typed later on, prior to Mr. Levine's signing it, and that is my handwriting there, too. You will notice the rest of the affidavit -- and the Magistrate, I believe it was Magistrate Catoggio, accepted it with the handwritten words written in prior to the time Mr. Levine saw the affidavit.

MR. BELDOCK: It was prepared on the 19th?

MR. FRIED: Yes.

MR. BELDOCK: I point out that the "Wherefore" clause requests a warrant be issued for the defendants Freeman and Davis. That was the basis of my question.

This is the arrest warrant pursuant to which you came upon Mr. Freeman in the street on June 19 around 5:00 o'clock, and arrested him; is that right?

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THE WITNESS: She was arrested on the

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Yes.

time; is that right?

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Q May we see it?

	Levine - cross
	2 A That was returned to Mrs. Dawn Freeman, the wife
	of the defendant.
	4 Q Did Mr. Golub and Mr. Freeman have a conve
	5 sation at that time about the briefcase?
	A There was no conversation that I can recall regard
	ing that.
8	What did you say when you first placed
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10	A "You are under arrest."
11	Q What else did you do in that respect?
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14	the effect that he is an attorney and he didn't want to be
15	involved in this.
16	I said he is not involved. "We have an
17	arrest warrant for Mr. Freeman," and that was about it.
18	Q Did you show the arrest warrant?
19	A I might have. I really don't recall. I believe
20	I did.
21	Q You frisked both Mr. Golub and Mr. Freeman
22	and found they had no weapons; is that correct?
23	A That is correct.
24	Q And Mr. Freeman had that attache case with

him?

1	Levine - cross 130
2	A I took it out of his hand.
3	Q You took it?
4	A Yes.
5	Q Did Mr. Freeman, if you recall, say to
6	Mr. Golub, regarding the briefcase, words to the effect
7	he wanted Mr. Golub to take it?
8	A I don't remember that.
9	2 Do you remember saying words to the effect,
10	"No, we want that; we will take that"?
11	A I don't recall that.
12	Q Here you say you again read the same
13	constitutional rights and there wasn't any discussion abou
14	the facts of this case from that point on until after you
15	had gotten down to Varick Street for process; am I right
16	(indicating)?
17	A That is essentially correct.
18	Q Is there any exception to that?
19	A The only statements that were made in the car were
20	by Mr. Freeman, but nothing concerning
21	Q The case?
22	A Right.
23	Q Then you had Mr. Freeman come in for
24	processing, fingerprinting, photographing, and so on?

That is correct.

1		Levine - cross	131
2		Q That was about 5:30 in the afternoon?	
3	A	(No response)	
4		Q Six?	
5	A	About that.	
6		Q You learned he was an alien?	2"
7	A	Yes.	
8		Q Did you learn he had been in the United	
9	States	for many years?	
10	A	I believe he stated that.	
11		THE COURT: Mr. Freeman?	
12		MR. BELDOCK: Yes. He mentioned that	45
13		on direct. I wanted to straighten it out.	
14		Q On direct, you said first you went through	1
15	whatev	er Mr. Freeman was carrying in his bag. How did	you
16	do that?		
17	A	Did I say first?	
18		Yes, before questioning you may have meant	
9	Apparently that's what you meant. What did you do when yo		
0	went th	arough that bag?	
1	A	What did I do?	
2		Q Yes.	
3	Α	I opened the bag and I went through the bag item	by
4	item.		
		Were there any items in the bag?	

is not present in court. I will have it tomorrow.

THE COURT: Mr. Fried, anything further?

MR. FRIED: No.

MR. BELDOCK: I'm sorry; I am not finished. I just asked to look at the documents, but I don't have much more.

THE COURT: All right.

(Pause)

MR. BELDOCK: Your Honor, I am offering in evidence this set of papers which we put a rubber band around, and with Mr. Fried's permission Mr. Freeman will look at the contents while I continue to examine the witness.

THE COURT: You are offering it into evidence?

MR. BELDOCK: Yes.

THE COURT: What has it got to do with the hearing?

MR. BELDOCK: The witness testified as to the manner of searching through documents.

THE COURT: These are the items he saw but did not keep.

MR. BELDOCK: Yes, he kept them in his possession. He didn't find evidentiary value in them in this case. He looked through them, though.

THE COURT: Well, you may mark them, with Mr. Fried's consent.

MR. BELDOCK: Mark them for identification.

THE COURT: I don't know what they have

to do --

MR. FRIED: These documents were seized and have no value and the Government does not intend to introduce them.

THE COURT: All it shows is that the agents were selective. They took what they thought was relevant and left what they thought wasn't relevant. The mere fact they didn't seize something doesn't cast any doubt on what they did seize.

MR. BELDOCK: Judge, rather than argue before the witness --

THE COURT: Suppose this shows a legitimate business --

MR. BELDOCK: I am not trying to show that. The Government had a bunch of papers and the man had no right to go through them and select things. There was a bunch of papers that required him to look through and pick certain things out. I would like to make a

legal argument based on that. I think it is sufficient for the moment to mark them for identification. I would like to look through them to see.

THE CLERK: Numerous documents marked

Defendant Freeman's Exhibit B for identification.

THE COURT: I would suggest that you spend a little time proving these papers prove he is in a legitimate business.

MR. BELDOCK: I am not interested in showing that at all. They happen to be business papers. That is not the point I make though.

THE COURT: Some of our best known narcotics dealers were also in legitimate businesses.

MR. BELDOCK: Yes.

THE COURT: It just proves there are twenty-four hours in a day.

You were saying on direct examination after you started searching through the briefcase, the material in it, you found a card with the name Theresa Costa. Is that the first name you found that you thought was of some interest and brought to Mr. Freeman's attention?

MP 3/2 fols 14

A Yes, I believe it was.

Q Am I right in recalling your testimony on direct examination as to that point? Nothing else was found and as a result of the conversation between yourself and Mr. Freeman he called his attorney, Mr. Leondon, and you called Mr. Fried?

A Yes, I believe it was as a result of that.

While you were waiting for the lawyers to come down you were having a conversation with Mr. Freeman although you say you weren't asking questions? He was volunteering statements?

A That is correct.

(Continued on the next page.)

Am I right, in the course of those statements, and in the course of the time he was with you,
Mr. Freeman, on several occasions, at least, was telling you
that the only reason he was in trouble was because he was
doing a favor for someone, he had been duped, and the whole
thing could be explained?

I believe that is essentially what he was saying.

Q He said that on a number of occasions?

A Yes, sir.

Q That is something you put in your report, right?

A I believe it is in there.

Then, while waiting for Mr. London and Mr. Fried to arrive, you continued to search through papers in the briefcase, is that right?

A I believe I was. I probably was.

Q You seem to have said that on direct.

Then you came onto the Exhibit 4 material that was produced?

A Yes.

and Mr. London, the attorney, and Mr. Freemar told you that his friend, this person George, had asked Freeman to refer him to an immigration lawyer for Theresa Costa, the woman

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2	George was with?
3	A Yes.
4	Q Di
5	there had been a
6	recommended
7	A Personall
8	Other agents und
9	Q At
10	the information?
11	A At first
12	Immigration, that
13	Q Lat
14	there was?
15	A No, later
16	contacted, and it
17	to have referred
18	attorney.
19	Q To
20	A I am speak
21	testify in this c

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d you ascertain subsequently, in fact, n immigration problem that the lawyer was

y, I did nothing to investigate that. ertook to investigate.

first they found out they couldn't find

they found, through an inquiry with t there was no such person on file.

ter on, after indictment, they found out

on in the investigation other parties were t was found out that someone else claimed this George to the same immigration

the attorney Mr. Pataro?

ing of a person who I understand will testify in this court, whose name is David Duffy, who was a friend of George.

Right.

And he stated that he referred George to Mr. Pataro. MR. FRIED: I believe at this time we

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are getting beyond the scope of this subject.

Q Did you find the name David among the papers in Mr. Freeman's briefcase?

No, I did not.

MR. BELDOCK: May I have just a moment? I think I will be through with this witness. I would like to look at my notes and speak with Mr. Wall for a moment.

(Pause)

You probably have given me a sufficient answer on this before, Mr. Levine, but I will ask anyway.

When you and the other agents went through the Rosalys Rudner bag, whatever it was, in the evening of the 18th, Mr. Davis was not present?

A When we went through the bag?

Yes.

No, he was not present.

MR. BELDOCK: I have no further questions of this witness.

THE COURT: Mr. Fried, anything further?

MR. FRIED: I have nothing.

THE COURT: You may step down.

Do you have any more witnesses?

MR. FRIED: One minute, please, your

Honor.

MR. BELDOCK: May I say, your Honor,
I am through except for two things that the
agent said he would produce tomorrow.

THE COURT: That is not going to hold up the trial. I am going to assume the original is like the copy, and the date of making the report is not going to affect the determination.

MR. FRIED: I believe Mr. Levine's testimony is sufficient.

THE COURT: All I am asking is if that is all you have.

MR. FRIED: That is all.

THE COURT: Do you want the Government to call any other witness?

MR. FRIED: Agent Silvestro and Agent Joe King are available.

MR. BELDOCK: Just a moment, please, Judge.

(Pause)

MR. BELDOCK: I don't require the Government to call further witnesses, your Honor.

THE COURT: The Government rests, then?

MR. FRIED: That is correct.

THE COURT: The defendants rest?

MR. WALL: we do.

THE COURT: All right, gentlemen. Let me see if I have the facts straight as to what you agree and disagree on.

I am ready to find that -- or tentatively find -- that is a better way of putting it -- that Marilene Tambini was arrested on June 13, 1973, at about 11:00 o'clock as I recall it.

MR. FRIED: I believe it was about 10:00 o'clock, your Honor.

THE COURT: About 11:00 o'clock. She had arrived on a plain from Buenos Aires which Landed at John F. Kennedy International Airport. And upon arrest was searched and five pounds of concaine was seized.

Rosalys Rudner accompanied her on that flight, witnessed the arrest, and registered in Room 1815 of the Paramount Hotel on 46th Street. She registered in the early morning hours of June 14th. And soon thereafter, and before the 15th of June. when the room was put under

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agents of the Customs Bureau, abandoned the apartment, abandoned two pieces of luggage, and became a fugitive.

No one entered or left that room from the time Miss Rosalys Rudner left it with intentions not to return.

A clerk of the hotel advised Mr. Levine, one of the surveilling agents, that a man by the name of Davis called and stated that he would arrive at the hotel for the purpose of picking up the baggage.

In the meantime, at the request of the surveilling agent, the hotel did not seize the baggage for nonpayment, but left it in the room.

Ar. Levine entered the room with the clerk of the hotel, at a time when the hotel had a right of entry and after the room had been abandoned.

Mr. Levine removed the baggage tag.

I find that the tag was properly -I hesitate there, because I doubt that I need
come to that finding at all -- I don't think
the defendant has any right to challenge the
standing -- to challenge the seizure.

to?

MR. BELDOCK: Of the tag you are referring

THE COURT: I beg your pardon?

MR. BELDOCK: You are referring to the tag?

THE COURT: The tag.

MR. BELDOCK: Yes.

THE COURT: I doubt that Mr. Freeman has standing to challenge the search of the baggage under Brown against United States which limited the effect of Jones, if it didn't in fact overrule it, 93 Supreme Court 1655, decided April 17th, 1973.

Under the circumstances of the arrest of
Marilene Tambini and the flight of Rosalys Rudner,
and upon the information contained in the statement given by Tambini to the agents, marked
Government's Exhibit 7, the agents had reason
to believe that Rosalys Rudner was heavily involved in drug trafficking.

It appears from the statement made by
Marilene Tambini that it was Rosalys Rudner who
delivered the cocaine to Tambini, and told her
how to act and supplied the answers to questions
that probably would be posed by the Customs

Officials and by the hotel management.

Marilene Tambini in her statement says
that Rosalys Rudner indicated that Tambini was to
go through Customs first to see whether she got
through Customs.

The surveilling agents had reason to believe that the baggage contained narcotics, and
probably cocaine. I think it is fair to infer
that if Rosalys Rudner was a fugitive at that
time, and had abandoned the suitcases, whe would
find it convenient to discard in riminating
evidence.

When John Spencer Davis arrived at the Paramount Hotel to pick up the baggage, the agents had probable cause to believe that he knowingly and wilfully was carrying narcotics. Here again, I don't think that the defendant Freeman has standing to challenge that arrest.

I think the crux of this case, in determining whether the arrest of Freeman was lawful, turns on the position of Mr. John Spencer Davis, and possibly the reliability of his information.

The only statement in the affidavit to support the warrant is in Paragraph 9, a statement by

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the defendant John Spencer Davis to your deponent that he was instructed by the defendant Stanton Freeman to pick up Rosalys Rudner's luggage at the Hotel Paramount, New York, New York.

This is a pretty general, brief, conclusory statement. That is the part that troubles me.

Incidentally, I make no determination as to the validity of the opinion expressed by Mr. Fried that he had the right to search the baggage, because I don't think I ever reached that. Again I don't think he has standing. I discussed that question quite fully in a lengthy opinion -- I write lengthy opinions -- in United States against Cangiano -- I just analogized it to the case there where I think the airlines have a duty to inspect whatever goes on board, and there are tariff regulations that permit that. You know the Supreme Court recently said that a hotel does not have the right to sell, they might have the right to seize -- in that case they have the right to sell if they seize -- pursuant to a hotelman's lien, but that does not answer the problem here. The fact is it wasn't done. I don't reach that question.

What do you say about that statement, do you think that is enough?

MR. FRIED: I think that is sufficient.

The previous paragraphs in that affidavit indicate that Rosalys Rudner herself had come off the plane with Marilene Tambini.

THE COURT: Of course we must come back to

Spinneli and Aguila -- I don't know that I am

ready to answer that question at this point.

Remember the two prong test, as I recall it, said

out in Aguila and Spinneli -- I don't know whether

it meets the test.

MR. FRIED: We are dealing here with a situation of an individual who himself was arrested with contraband.

THE COURT: That is why I say --

MR. FRIED: We are not dealing with the --

THE COURT: I didn't say informer, if
you notice, I said the relationship. Where you
have someone who is part of the crime, in other
cases there are specific details which indicate
he is part of the crime, he is familiar with
everything about the crime, the time and place.
That is why I asked the question such as did he

know any of the other participants in the alleged conspiracy. That would have indicated to me that he knew all about this.

MR. FRIED: In fact, the opposite was the case, as the testimony indicated. Davis was sent merely by Ornitz and Mr. Freeman that afternoon.

THE COURT: I can only read what is in the affidavit. You can't go outside the affidavit. A statement by the defendant John Spencer Davis to your deponent that he was instructed by the defendant and Stanton Freeman to pick up Rosalys luggage at the Hotel Paramount in New York.

I don't say you are bound by the civil rules of law which says proof of agency cannot be introduced by the -- the determination of agency can't be made on proof of statements of the agent that he was employed by the employer. This is not a case where we are trying to establish agency. It is a case where we are trying to show probable cause to believe.

In effect, Mr. Davis says, yes -- the proof shows through the clerk, Mr. Davis was there. He is in some kind of relationship with Rosalys Rudner, or at least with the baggage, because he

is willing to pay for her hotel bill and pick
up the baggage, which indicates that he knew
there was something of value there. People don't
pay money for nothing. So he pretty well put
Mr. Davis in.

From there, is there enough when he says that he was instructed by the defendant Stanton Freeman to pick up Rosalys Rudner's luggage at the Hotel Paramount? It would have been interesting, of course you didn't have it, to show in the affidavit that one of the men that was at Mr. Freeman's place of business was also sitting in the Paramount Hotel —

MR. WALL: The Diplomat.

MR. BELDOCK: That was the Diplomat. He was talking about another member of the organization at the Hotel Diplomat or at the nightclub at the Diplomat who was walking out with Freeman, that's all he was talking about, walking around the hotel.

THE COURT: That has nothing to do with any activity at the Paramount. Then I have to eliminate that.

Just talking about the sufficiency of

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that allegation --

MR. FRIED: Your Honor, the Government --THE COURT: The next question is whether there was anymore -- aside from the warrant, there is always a question as to whether, even if the warrant is invalid, the arresting officer knew enough about the activities upon which to base probable cause that a crime was being committed. I will just hear Mr. Fried on the question of sufficiency of the affidavit.

MR. FRIED: Your Honor, the affidavit -it is not a reliability question. You have the defendant himself, rather, a man named John Spencer Davis who was arrested in possession.

THE COURT: I will try to find the language in Spinneli, if you will just bear with me.

Mr. Justice Harlan says in Aguila that a search warrant could issue upon an affidavit of the police officers who swore only that they had received -- "received reliable information from a credible person and do believe that narcotics were being illegally stored on the described premises. While recognizing that the Constitutional requirement of probable cause can be satisfied by hearsay

information, this Court held the affidavit inadequate for two reasons: First, the application
failed to set forth any of the underlying circumstances necessary to enable the Magistrate to
independently judge of the validity of the informants conclusion that the narcotics were where he
said they were. That is a search warrant so there
had to be particularity in the search warrant,
under the Constitution.

"Second, the affiant officers did not attempt to support their claim that their informant was credible or his information reliable."

MR. FRIED: That is an entirely different situation. That is the situation where the informant provides information to the agents and the Magistrate himself has no way of determining the reliability of the informant whose identity has not been disclosed.

Moreover, the underlying circumstances are required to be provided under that line of cases and the more recent ones to coorborate the reliability of the man's information.

Here we have a person whose identity is disclosed, who himself has been arrested for the

commission or the alleged commission of a crime.

He is in possession of suitcases which, according to the evidence, the earlier paragraphs in the affidavit, relate to Rosalys Rudner, whom the agents have reason to believe, and it is in the affidavit, participated in the importation of this cocaine, and now this John Spencer Davis, the person who has been arrested, tells the agent that the person who sent him for these bags is the defendant Stanton Freeman.

THE COURT: So what you are saying under the test, really, is that because the evidence shows that Davis was a participant in a crime, in all probability a conspirator, -- and I was going to ask whether he was ever indicted -- was he?

MR. FRIED: He was not indicted, your Honor.

MR. BELDOCK: He is not alleged to be a conspirator.

THE COURT: It doesn't matter. The proof shows that he was a participant. He went to pick up the merchandise.

The only real question is whether he knew what was there. Now, he paid the hotel bill --

him.

MR. BELDOCK: With the money Freeman gave

THE COURT: I don't know that --

MP. BELDOCK: That was the testimony. I asked. At Freeman's instructions with the money Freeman gave him. That is the testimony.

THE COURT: He paid the bill and he was a participant.

If you don't want to call him a participant in the crime, in the activity; he knew what was going on. From all the other circumstances, all the other evidence, Rosalys Rudner was a narcotics dealer. There is no question in my mind about that.

By this time the Government knew that she was a fugitive, so his relationship to Rudner, the payment of the bill, in my mind makes him a participant.

MR. BELDOCK: You mean Mr. Freeman's relationship to Rudner or Mr. Davis'?

THE COURT: Davis' participation. I didn't say Freeman, did I?

MR. WALL: No.

THE COURT: Davis is the crux of this entire

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situation, whether he is a reliable -- I should not use informant because we usually think of him as a Government employee or someone just feeding tips to the Government, or information to the Government. He was in a position to know what was going on and, as I recall it, there are two tests: One, whether the information is credible and whether the informant is credible.

(continued on next page)

MR. BELDOCK: If your Monor pleases, there is no testimony regarding Mr. Davis knowing anything, except for the fact that he was given the money and instructed to bring the bags back, and he did that, and that Mr. Freeman gave him the instructions.

There is no basis for a finding beyond that in the --

THE COURT: Mr. Beldock, I say, even if I find that Mr. Davis' arrest was unlawful, the fact is that he knew enough about this, about the transaction. He did come to the hotel; he did pay the bill; he did know Mr. Freeman.

MR. BELDOCK: He had first met him that day.

THE COURT: Money from Mr. Freeman.

MR. BELDOCK: That's all there is on the testimony.

THE COURT: But you are not in a position -Mr. Freeman is not in a position. He has no
standing to question the legality of the arrest.
That's quite unimportant.

MR. BELDOCK: I realize your Honor has

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tentatively made a finding, as you say, but I beg to differ with your Honor on that, and I want an opportunity to argue and perhaps examine the case, because I would think that Mr. Freeman has standing clearly regarding the Rudner bags, because Mr. Freeman on this testimony is the one who made the phone call to the hotel, gave the messenger, Mr. Davis, the money, instructed him to go to the hotel and come back with the bags to Mr. Freeman. The bags were turned over by the hotel to the man Davis, who paid for them with the money Freeman gave him. He received the bags and the hotel gave up dominion.

Certainly Mr. Freeman has standing. He has clear standing regarding those bags. They were taken into possession at his instructions, on this testimony.

THE COURT: I think --

MR. BELDOCK: I know I want -- I would like to read the cases because --

THE COURT: I think you should read Brown v. U.S., 93 Sup.Ct. 1565, where the Chief Justice in effect says that under Simmons

/

& Harris, defendant cannot really claim that he's in a dilemma because by trying to prove standing he may very well be incriminating himself, because under Simmons & Harris the evidence that he gives in a pretrial hearing cannot be used against him on the direct case of the Government.

So that was the whole reason for -under Jones. How can the defendant come in?
He is in a dilemma. He can't try to prove
standing because in that event he would be
incriminating himself, saying, "I owned the
cocaine; I owned the heroin."

MR. WALL: Your Honor, it seems to me implicitly what the Chief Justice also said was that such hearings may take place without claims of prejudice and they can take place only if one has standing to suppress in the event of a successful argument.

And under Simmons, why -- from the portion of that case that you just read, it seems nothing surprising because Simmons itself and Harris itself made the statement that one cannot have used against him on the

Government's direct case whatever admissions he makes on the motion.

I don't read that, your Honor, as changing the question of standing. Both --

Speaking now only for Mr. Ornitz, as
I understand the facts of this case, Mr. Ornitz
definitely would have standing because he is
going to get roped into this conspiracy, if
at all, by virtue of what the Government will
contend is his, in effect, constructive possession of the items found in that suitcase.

And I simply don't read the Brown case as changing the rule on who has standing to move to suppress items.

THE COURT: Well, I read the Brown case to indicate -- maybe in those cases where the proof, the Government's contention is that this -- that the defendant charged was in possession of the narcotics. That is not the Government's proof here.

The possession of the narcotics here, at least the five pounds, was in Tambini. They claim only that --

MR. BELDOCK: Approximately three grams.

THE COURT: -- Mr. Freeman was part of
the conspiracy and as proof of part of the conspiracy they show the relationship of paying the
bill from Mrs. -- whatever --

MR. BELDOCK: Rudner.

THE COURT: Miss or Mrs. Rudner and obtaining the baggage which contained narcotics.

MR. BELDOCK: Then the Government can't have it both ways, Judge. Either we are charged with possession of what's in those bags, which is the way the Government backs into the indictment, and the only way --

THE COURT: The charge is not possession; it's conspiracy.

MR. BELDOCK: Yes, your Honor. But their evidence to involve Mr. Freeman has to do with the contents of those bags.

MR. FRIED: Not the contents, your Honor, the fact of the bags.

MR. BELDOCK: The cocaine willnot be introduced into evidence here?

MR. FRIED: The cocaine will be introduced into evidence, but it's not the fact of the cocaine in the bags that the inference

backwards flows.

In any event, the Jones case -- rather, the Brown case expressly did say that in light of Harris & Simmons, that the Jones situation certainly is no longer -- no longer obtains in that the standing is only as to the one who is charged with the possessory crime, and here none of the defendants, Ornitz or Kim, are charged with the possessory crime, except the possession of the five pounds of cocaine that came in at Kennedy Airport.

MR. BELDOCK: No, your Honor. If the Government --

THE COURT: Here is a significant statement when you say possession is part of the crime. Page 1569:

"What is not necessary for us now to determine whether our decision in Simmons supra makes Jones automatic standing unnecessary. We reserve that question for a case where possession at the time of the contested search and seizure is an essential element of the offense charged."

MR. BELDOCK: Well, the -- Your Honor,

you pointed out when I argued the motion on the indictment that they used the date June 18th, and I am saying to your Honor that the only basis they have to use the date June 18th and to connect my client, Mr. Ornitz, with the June 13th importation is the contents of Rosalys Rudner's bags.

THE COURT: Mr. Beldock, possession of -by Mr. Freeman of the luggage on June 19th is
not an essential element of the crime charged,
period. It may be proof of his entry into the
conspiracy.

As a matter of fact, I doubt that the Government had to allege any overt act. I believe that the conspiracy --

MR. BELDOCK: I realize that.

THE COURT: -- under the Drug Abuse

Control Act is the same as a conspiracy under

Section 174. It was never necessary, though
the Government always alleged it.

MR. WALL: Part of my point, your Honor, is that factually we are talking about a question of Ornitz's standing. Factually, there can be no -- and forgetting for the moment the

other argument, as to insufficiency, but there could clearly be no conviction of Ornitz of this overall conspiracy in the absence of factual proof as to his relationship with respect to the cocaine in that luggage.

heard that that's the only proof the Government has to connect either defendant with the conspiracy, but that's far different from saying that possession by either defendant is necessary to prove the conspiracy against him.

It may turn out to be the same in the --

MR. WALL: As a theoretical matter, your Honor is right. A factual matter, if that proof were out of this case, there would be no trial, it seems to me, certainly. Not as to Ornitz, and not as to Freeman, as I view it.

MR. PELDOCK: Your Honor, I feel somewhat at a disadvantage without having analyzed
the case that you are reading in relation to the
standing question that's now being raised.
I think it's important that we examine that,
because based upon my past practice and understanding of the issue of standing, I believe

that we had proved more than sufficient by showing the facts that were shown.

THE COURT: You are claiming standing to challenge what, the arrest of Mr. Davis?

MR. BELDOCK: The search and seizure of the Rosalys Rudner bags.

THE COURT: It's the arrest of Mr. Davis, because the search and seizure were made incident to that arrest.

MR. BELDOCK: No, Judge, they were not, and I'm glad we went on this far. That is not the kind of search which is considered incident to the arrest.

If they had searched -- they did not conduct the kind of search that would be considered incident to an arrest. This was not a search for personal safety purposes at the spot; this was not a search in connection with the arrest at all. It was many hours later that a search took place. They had no --

THE COURT: You don't think they could also search for evidence of the crime?

MR. BELDOCK: No, they had no more right to examine into those bags than they did

in the hotel without a search warrant. The very same circumstances that prevailed in the hotel, the hotel had not come forward and given its consent under its practice and its rights existed after those bags were taken from Jock Davis.

Now I am prepared, and Mr. Wall I think will support me in an argument on that line.

THE COURT: There is no sense talking about the rights of the hotel to search the baggage; I doubt that they had the right.

MR. FRIED: Your Honor, there is a Second Circuit case that gives them the right to search.

MR. BELDOCK: My argument is that the Government would have needed a search warrant at the time that the bags were in the hotel and they just as well needed a search warrant at the time many hours after they took Mr. Davis into custody and arrested him, they proceeded to search these bags in what is purely an evidentiary search, and we are the ones who have the standing, because from the evidence it was Mr. Freeman who paid for it, took it

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into possession through his agent.

We are going to be pressed with exactly those circumstances in the case. That's the evidence that will come in against us. At least we should be entitled to the value of that evidence for standing in a suppression hearing.

MR. WALL: It seems to me, your Honor, that under Chimmel, this search, which took place in the absence of Mr. Davis, and that was the last question that Mr. Beldock put to Mr. Levine, the search took place hours after the arrest and in Mr. Davis's absence.

THE COURT: Was it lawfully seized? MR. WALL: I don't believe it was lawfully seized.

MR. BELDOCK: No.

THE COURT: He was carrying the bags on him, wasn't he?

MR. WALL: Lawfully seized, lawfully taken for the purpose, yes.

MR. BELDOCK: Of custody, of holding it, yes.

MR. WALL: Then they had ample time to

go in and get a search warrant. It is interesting in light of the testimony that Agent Levine did not hear from Davis about any coke, nor did they have any reason to believe -- and I think that is the testimony --

THE COURT: What you are saying is that Mr. Freeman and Mr. Ornitz can contest the lawfulness of the arrest of Mr. Davis?

Isn't that what you are saying?

MR. WALL: No, sir.

MR. BELDOCK: No, sir.

MR. WALL: I am saying that what --

THE COURT: You are conceding the lawfulness of the arrest?

MR. WALL: I am not conceding it.

THE COURT: Assuming it, then?

MR. BELDOCK: Those were Mr. Davis's bags, Judge. Mr. Davis, on this evidence, had only one obligation, to take the money as a messenger, go pick up and come back. The money came from Mr. Freeman.

THE COURT; Mr. Beldock, do you think that if Mr. Davis were carrying a gun on him but it belonged to Mr. Davis, that the Government

wouldn't have the right to seize the gun?

MR. BELDOCK: Completely different question.

THE COURT: Even though it was Mr. Davis's?

MR. BELDOCK: That's the point, your Honor.

That's why this is not a search incident to

an arrest; this was not a search for known

contraband. This was not a search for per
sonal safety reasons, which would have been

the reasons for a search incident to an

arrest.

This is a purely evidentiary search of the bags made hours later.

THE COURT: Did they have the right to take it from Mr. Davis? Do you think they should have kept him in custody and permitted him to keep his baggage?

MR. WALL: No.

MR. BELDOCK: No.

MR. WALL: I think they had a right to separate him from his bags. They had an opportunity perhaps at that time, if they couldn't separate him from the baggage, to make sure that there were no guns in the baggage.

They did not do that. Some hours later and at a point where the baggage was far removed from Mr. Davis, the police or the agents, without doing what they clearly could have done or could have attempted to do, did not seek a search warrant.

THE COURT: All right.

MR. BELDOCK: May --

THE COURT: 3e prepared to argue this at 9:30 tomorrow morning.

MR. BELDOCK: Thank you, Judge.

THE COURT: But I want a complete argument then. I will do the best I can. I intend to decide it tomorrow.

Incidentally, I find that this is the only question. I find no other serious quesion raised.

MR. WALL: You mean the question -Are we talking now about the question of
standing as well?

THE COURT: That's right.

MR. BELDOCK: Standing and the question on the face of the warrant.

THE COURT: And the sufficiency.

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MR. BELDOCK: Yes.

THE COURT: The sufficiency of the allegation in the affidavit.

MR. BELDOCK: 9:30, Judge. Thank you.

THE COURT: Yes.

MR. FRIED: Thank you, your Honor.

THE COURT: All right.

(Whereupon, a recess was taken until

September 11, 1973, at 9:30 o'clock a.m.)

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2	UNITED STATES DISTRICT COURT
3	EASTERN DISTRICT OF NEW YORK
4	x
5	UNITED STATES OF AMERICA,
6	- against - 73-CR-633
7	STANTON FREEMAN, and KIM ORNITZ, :
8	
9	Defendants. :
10	x
11	
12	United States Courthouse Brooklyn, New York
13	September 11, 1973 10:00 o'clock A.M.
14	10.00 G GIOCK A.M.
15	Before:
16	HONORABLE JACOB MISHLER,
17	CHIEF U. S. D. J.
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BURTON SULZER
OFFICIAL COURT REPORTER

Appearances:

ROBERT A. MORSE, ESQ., United States Attorney for the Eastern District of New York

BY: BERNARD J. FRIED, ESQ., Assistant U. S. Attorney

PATRICK M. WALL, ESQ., Attorney for Defendant Ornitz

MYRON BELDOCK, ESQ., Attorney for Defendant Freeman.

BS:pc take 1/1 THE CLERK: Criminal cause on trial,
United States against Stanton Freeman and
Kim Ornitz.

THE COURT: Both sides ready?

MR. WALL: Yes, sir.

MR. BELDOCK: Yes.

THE COURT: I assume that the argument today is whether the evidence seized from Mr. Davis is admissible.

And that turns, first, whether there was probable cause to believe that Mr. Davis was committing a crime at the time, and, of course, the standing issue may be the first issue.

I rather believe that standing is such

a -- it was under Jones such an elusive doctrine

that oftimes I would rather reach reach the

merits. If we find the arrest is lawful there

is no sense in reaching the more difficult

problem.

Then we have whether the affidavit in support of the warrant is sufficient. On that will turn the admissibility of the document seized, which, as I recall it, was a letter

which had the assumed name used by -- or at least the Government says the assumed name used by Rosalys Rudner.

MR. BELDOCK: It is actually the family name.

THE COURT: At least that might indicate a connection between --

MR. FRIED: That letter was seized from the hotel room, the garbage pail, not from the defendant himself.

MR. BELDOCK: Or any of the other parties.

THE COURT: That letter was seized at the Paramount Hotel?

MR. FRIED: That's right.

As Mr. Levine testified yesterday, at 4 o'clock, when he went to the room with the security guard.

THE COURT: Tell me what was seized at the time of the arrest?

MR. FRIED: Two suitcases, and contained within the suitcases --

MR. BELDOCK: You are talking about the Davis arrest or the Freeman arrest?

MR. BELDOCK: I realize that Mr. Fried

did not understand you, your Honor.

THE COURT: The Freeman arrest.

MR. BELDOCK: The Freeman arrest.

If I may, your Honor, the briefcase was full of papers, and from those papers the Government has produced certain ones here that they obtained. Those were exhibits --

MR. FRIED: I'm sorry, your Honor.

MR. BELDOCK: Exhibits 4, etcetera.

MR. WALL: It is an envelope with a postmark of May 19th, which has on it one name and telephone number where it was possible, at least on May 19th, to reach a co-conspirator.

THE COURT: Rudner, right?

MR. WALL: No, I don't believe it is Rudner, I believe it is the male.

MR. BELDOCK: There are a number of papers -- not Rudner, Judge. One envelope that you have before you now -- they are being handed up to you --has George's name and number on it.

THE COURT: Exhibit 4, George, 6770100, extension 282, and Lucia, 5332660.

What significance do you say --

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MR. FRIED: George, your Honor, is -that refers to George Moro, who is a coconspirator, who is the link between the Brazilians, according to the Government's theory, and Mr. Freeman.

THE COURT: So this is incriminating evidence if it is admissible.

First the lawful arrest of Davis.

After Davis was arrested, the search was made an hour and a half later.

MR. BELDOCK: At least.

THE COURT: Is that another question?

MR. WALL: Yes, sir.

MR. BELDOCK: That was -- it was probably made about three hours later, from what I can figure.

THE COURT: We will say search made three hours after. Is that correct?

AGENT LEVINE: Two to three hours.

MR. BELDOCK: It is made at a separate place without the defendant, without Davis present.

> MR. FRIED: At 201 Varrick Street. Davis is there at the time being

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processed.

THE COURT: Sufficiency of the warrant.

Is there any question as to when the search was made, as to whether the search was incident to that arrest?

MR. BELDOCK: I am claiming that the search that Mr. Levine conducted through Mr. Freeman's briefcase at Varrick Street, or wherever it was, was not a permissible search incident to an arrest.

I am claiming that, and I am prepared to argue that issue.

THE COURT: Why? Assume the lawfulness of the arrest, why do you say it was not incident to the arrest?

MR. BELDOCK: First of all --

THE COURT: Before we go on. These are other papers -- 4 was returned to you. 4A, George Moro, M-o-r-a-u -- this seems to say M-o-u-r-a-1, but that seems to be the handwriting.

Then there is a Terry or something Costa. That is 4B.

> Then there is Okim Ornitz, 4D. On 4C, I don't know who the Government

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says --

MR. FRIED: This could become incriminatory. THE COURT: But there is a name on there and you are not sure?

MR. FRIED: There is a name on there.

THE COURT: All these came from his address book?

MR. FRIED: In addition to that one paper in front of you, the card with the name Terezinna Costa, Government exhibit 3, I believe.

THE COURT: You say this was found in the hotel room?

MR. FRIED: That was found in Mr. Freeman's briefcase.

THE COURT: That is what I first thought.

MR. FRIED: There is another letter.

THE COURT: I was referring to this. That was my recollection, that the name Terezinna Costa, some other notations here, was the document found in the briefcase.

You tell me why the search that produced these documents 3 and exhibits 4 to 4D were not incident to the arrest?

MR. BELDOCK: Although the facts are fresh in your mind, your Honor, I would like to review those facts because they are very pertinent. It is a very precise question in this instance.

Mr. Levine takes Mr. Freeman into custody, arrests him on the street and takes him with his bag around 5 o'clock or so down to Varrick Street. He is processing him.

Sometime in that process, as well as

I can recollect, maybe an hour later or so, he
begins to look through the briefcase.

He then, searching through -THE COURT: Is that significant, an hour
or so?

MR. BELDOCK: Yes. Well, it is significant in regard to the general standards.

In this particular case I think the following facts are more significant.

Obviously the search is supposed to be contemporaneous with the arrest. The Government can argue that an hour later is not contemporaneous -- is not lacking in contemporaneousness.

I think what comes next is most significant.

THE COURT: Was it properly seized?

MR. BELDOCK: It was properly seized in the sense that he had it with him. If the arrest was lawful, if the warrant was lawful, then, taking the bag itself into custody, not looking through the contents --

THE COURT: I am assuming the lawfulness of the arrest, then it was properly seized.

The Government had possession of it properly, but you say it should not have opened it.

MR. BELDOCK: Yes. If I can just finish the facts, because it is not a question of not opening it.

Certainly, under present standards, if

Levine had opened the briefcase on the street

for personal safety reasons and had seen

contraband in there, or had seen a weapon in

there, or anything like that, that is a search

incident to an arrest. That is a contemporaneous

search.

THE COURT: How about the argument that the delay was for the convenience of the arrestee and for the purpose of avoiding embarrassment,

and that it was not the appropriate place to go through, to rummage through the contents of the bag?

MR. BELDOCK: That argument doesn't meet what I was just discussion, your Honor. They may make that argument, and I will get to it in just a moment -- I don't mean to put your argument off. I am just saying that if Levine had acted in such a way as to look into the bag originally, it would have been, under present standards, correct. This is no question of convenience. He is taking a man into custody.

If he fears for his personal safety, which is a standard Government and policeman rationale, he should look into the bag then.

So at least they have lost that contemporaneous type of search, which would have been permissible. I say then if he had opened the bag and seen something in plain view, there is no question about the fact, he can't blind himself to something in plain view. I think I will have to conceed that.

Now, what happened next -- and the

point your Honor just raises, well, the Government will not contend, I take it, that we looked at it at our convenience and at his convenience.

Looked at it for what? What right did they have to go into that bag at that time? This was not a search for personal safety reasons, it is not a search to prevent destruction of evidentiary items; there is no risk of flight, there is no emergency.

I am just ticking off all of the standards.

It is specifically not a matter of inventorying the property, and that is the point. It is in no way an inventory of the items taken into custody because Mr. Levine specifically said that he was not making an inventory, he didn't make an inventory, period.

THE COURT: What do you say the officers should have done at that point?

They have it, it takes an hour to get them down to Varrick Street, and --

MR. BELDOCK: He opens it, he looks at it.

THE COURT: It is what time of the day?

MR. BELDOCK: About 6 o'clock or so.

THE COURT: Six o'clock --

MR. BELDOCK: 6:30 or so.

THE COURT: You say at that point they should have tried to locate a magistrate and get a search warrant for the bags or return the bag?

MR. BELDOCK: It is a question of what they should not do, it is not a question of what they should do.

THE COURT: It is a question of what they should do. You tell me.

MR. BELDOCK: Those two things go together, what they should and should not do.

They should, if they have probable cause to believe that there is something in those bags they are entitled to look at, either evidentiary items or contraband or anything specified in the Federal Rules of Criminal Procedure, they should then go with the evidence that they have available, put it in an affidavit, present it to a magistrate and get a warrant.

What they shouldn't do is what Levine

did, and he had no right to do as far as I can tell under any cases. There are cases having to do with searches at precincts, but --

THE COURT: Let me ask you this --

MR. BELDOCK: Could I say what he should not do? He shouldn't make a general search through the papers for no purpose other than to seek for evidence. That's what he did and he did it first and went through certain papers for a while, found the first document which they have introduced into evidence, and confronted the client with it, then the client sent for his lawyer, then he goes on, Levine, willy-nilly, by himself, not for any purposes of protecting the property or protecting any claim against the Government about the property --

THE COURT: How about a search for the instrumentalities of the crime?

MR. BELDOCK: That's what you need a warrant for. What I am saying to your Honor is, that if he opened the bag and staring him in the face in the process of opening it for personal safety reasons, or to see whether there is any contraband or anything obvious --

there is something lying in their plain view, a big name, "George," then I cannot argue that the man can blind himself to that.

Like the plain view doctrine in a car-THE COURT: Do you have any cases to
support this?

MR. BELDOCK: First of all, there is the entire fundamental theory of the impropriety of a general search --

(continued on the next page.)

THE COURT: One case will do, Mr. Beldock.

MR. BELDOCK: There is one case that

I have not shepardized because the exigencies

of time have been enornous --

THE COURT: I left the courthouse at about 7:30 last night and you left at 4.

MR. BELDOCK: I left the office at one in the morning.

THE COURT: Did you work on this case?

MR. BELDOCK: I have this case only

from Squib. It is U.S. against Lipscomb.

THE COURT: What is the citation?

MR. BELDOCK: 435 F. 2d 795. Cert

was denied at 401 U.S. 980 and the rehearing

was denied at 402 U.S. 966.

THE COURT: Which circuit?

MR. BELDOCK: Unfortunately it is not here, it is not in my notes.

If I may say so, this was the last item
on my research exigencies last night, and in
both this case and others, I believe, exist
for the principle that the general basis for
the Government to start looking through somebody's

'

property when they have taken someone into arrest, and the person is there, exists: it is reasonable to inventory defendant's personal belongings -- I am paraphrasing the squib from USCA -- it is reasonable to inventory defendant's personal belongings without a search warrant following a lawful arrest where the inventory is necessary, both to preserve the property of the defendant while in jail and to forestall possibility that the defendant might later claim some items were not returned to him.

I believe, without having done any more research, that that is the law on the right to make an inventory. Even in making an inventory, your Honor, if he was going about making an inventory, he does not necessarily have the right to carefully read all of the defendant's personal papers. The point is, we don't have to reach this question. The Government hasn't gotten any evidence here to justify a general search as an inventory search because the Government's evidence is directly to the contrary.

Mr. Levine was looking for evidence,

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he was searching over a period of time for evidence. He went through a whole bundle of papers. He had lots of time to get a search warrant. He could have gotten a search warrant, your Honor, when he went to get the warrant for the man's arrest.

The facts have not changed between then.

Now, as far as I know, it is fundamental that such a general search for evidence which was justified after the fact by what was found is an invalid search. Also, I point out there was no reasonable cause for the arresting officer to believe that the articles subject to seizure were among Freeman's possessions. He didn't know anything about what Freeman had in that bag, it's a pure guess, the man is carrying a briefcase.

The facts of this case, Judge, are very unusual. The fact that he started to search through the briefcase, finally came upon a letter with Costa's name on it, talked about it, then went on at his leisure, going through all these things, and under no circumstances does he claim, nor was he in the process of making an

inventory. I stress inventory only for this
reason, as far as I can see, the only justification
the Government could offer, and they haven't
even offered it here, for such a general
search under these circumstances would be,
"Well. we had to look over his property and
make a list of the things to protect ourselves
and to protect him." They weren't doing it.

THE COURT: Do you want to argue on all the points, Mr. Beldock?

MR. BELDOCK: Yes.

Mr. Wall suggests he has something to add to that question.

THE COURT: On the point of the nature of the search after Mr. Freeman's argument.

MR. WALL: Yes, sir, very briefly.

It seems to me that if one lesson can be learned from the Chimel case it is that it is only necessity which justifies a search incident to arrest, because in that case, for example, the Supreme Court in effect says, "Don't go beyond the man's reach."

Once having by its own actions removed any necessity, it seems to me that what the

Government has done has been to get itself into that area which traditionally has required a search warrant. It may be that the time of 6:30 would have made it difficult had there been a necessity for it to get a warrant then, but there wasn't a necessity for it. They had impounded the suitcase --

THE COURT: I just happened across a statement in United States against Lipscomb cited by Mr. Beldock which says, "That we agree that there is nothing..." -- incidentally, the search was affirmed in Lipscomb, it wasn't turned over.

"We agree that there is nothing in Preston or Chimel that forbids the result we reach here. Both cases concern limits on attempts of police officers to locate and confiscate incriminating evidence.

"Chimel, in particular, was an effort to forestall 'the increasing legitimazation of wide-ranging warrantless searches of lodgings and buildings based on the fortuity of arrest on premises' which had been ushered in by United States against Rubinowitz." It was

really to limit Rubinowitz, because Rubinowitz, as I recall it -- there were 7 rooms in a one-family house, and the Court finally said no, just because you arrest a man in his house doesn't mean that you can go through the entire house.

MR. WALL: What we have here, your Honor, is a search through personal papers and effects, which has always caused --

THE COURT: Let me ask you this, Mr.

Wall, I tried to ask Mr. Beldock, but since

you are speaking, I will ask you, suppose they

had not seized his baggage at the arrest but

he accompanied them to Varrick Street and

there they seized the baggage and opened it

then and there, would there be anything wrong

in that?

MR. WALL: I think there would, your Honor, if the opening included more than those acts designed to protect the safety of the officers or to secure that evidence from possible destruction, that is my point.

There was no necessity for the type of reading through a man's personal effects,

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which fits in with the traditional concept of searches incident to an arrest.

Ever since Chimel, although Chimel dealt with a search in a dwelling house, ever since Chimel, the Supreme Court made it clear and did so in that case, that the reason for permitting the limited type of search incident to an arrest was, one, to protect the officers from the possibility of either harm or flight, and, secondly, to prevent a defendant, or a potential defendant, from destroying evidence.

The Court made it clear in Chimel,

I submit, that absent that necessity, based

upon those reasons, what the police must do is

to get a search warrant.

If, for example, if they make an arrest in a house, and by analogy, if they make an arrest on the street and the man has a briefcase, once they have gotten past the point of preventing destruction of whatever evidence may be there, or preventing flight, or preventing their own harm, they are put back into the situation of a person who must go to a magistrate and —something they clearly could not have done here —

specify with some particularity what it was they wanted to get out of the briefcase. If they had probable cause, a Judge will allow them, but this was clearly an exploratory search.

Mr. Levine could never have gone to a court --

sometimes an office has always been put in a different classification than the search of a piece of baggage. It was based on the old cliche that a house was a man's castle and only for the most compelling reasons should the Government be allowed to come into a man's house. But that isn't so where a man walks along a street with a briefcase and a piece of baggage or luggage. You can't really cite the cases that limit searches of houses.

MR. WALL: The point I am making, though, your Honor -- I grant you there is a difference, but one of the reasons for the traditional reluctance of the Court to allow, or at least traditional in the past few years, to allow wide-ranging searches, was because of the possibility of the police going through the

was in a briefcase. A man's home is where he generally keeps his personal effects. Mr. Levine could have gone through to the extent of making sure, if he was going to give this back to Mr. Freeman, making sure there wasn't a razor blade or a knife there, but you are talking about reading diligently the personal effects that he had there. There is no necessity for it.

THE COURT: As I understand it, what you are saying is that a police officer never has the right to search baggage or luggage of an arrestee, because all they do is seize it. They can't go any further.

MR. WALL: I am not saying that.

THE COURT: That eliminates the legitimate purpose and objective of searching; in other words, for weapons or for evidence that might be destroyed, because they no longer have control over it, 35 from there on, the arresting officer must go to the magistrate and say, "Here, we seized this. May we search it?"

MR. WALL: I am not saying that because,

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especially today, maybe there is a bomb in it.
The officer is allowed to do --

THE COURT: I was going to suggest that,
but I thought you might say that is far out.
That is so unusual, but if that is so, then they
certainly have an absolute right to go into find
out whether there is a weapon.

MR. WALL: Sure.

MR. BELDOCK: Yes, we have not denied that. We have said that --

MR. WALL: You don't have to read a man's phone and address book to see that there is no weapon in there.

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THE COURT: You say they had a right to open it to look for weapons?

MR. WALL: They had a right, it seems to me, to open it to protect themselves and --I don't care, I will -- there are bombs around, I would let them go through it.

THE COURT: We can refine that because there are so many sophisticated weapons these days, you know of letter bombs.

MR. WALL: Sure.

THE COURT: You know of the plastic envelopes that have given police officers the excuse to search at airports. You touch an envelope and it may be a bomb, so you say they can search for bombs but they may not look at anything else.

MR. WALL: Your Honor, yes, that's correct. I don't need to read this page to be secure in the fact that there is no bomb here, see, I don't need to read that.

Secondly, that is not what Mr. Levine was doing. He was doing this to protect himself.

THE COURT: How far may you go then,

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just feel, you mean?

MR. WALL: You may go as far as is reasonably necessary to put yourself within the necessity doctrine, which is at the heart of the search incident to a lawful arrest; that's what you may do.

Whatever conduct is reasonable based on the reasons for the search incident to the arrest is permissible.

But you don't have to read a man's address book to be secure in the fact that there is not a hand grenade in it.

THE COURT: Do you think it is reasonable after an arrest for the arresting officer to bring the arrestee down to police headquarters and say, "Empty your pockets, everything out now." Is that reasonable?

MR. WALL: Yes.

THE COURT: Can he look at what is there?

MR. WALL: It depends. My recollection is that there is a New York case which indicates at an inventory search. a search of the man's possessions, when he gets into the police station, a policeman who opened up a box of matches and

found a note inside it was told that that particular aspect of his conduct went beyond the necessity of the situation and constituted a general search for evidence.

THE COURT: Would you like to argue this now or do you want to wait until they get through?

MR. FRIED: I would prefer to argue it now if I could.

MR. BELDOCK: Could I, before Mr. Fried goes ahead, could I make one final point, your Honor?

THE COURT: If you make it the one final point on this point and give Mr. Fried the opportunity.

MR. BELDOCK: Yes, I meant to argue this last, but it happened to come up --

MR. FRIED: Why don't you finish the whole thing and I will argue the whole thing at one time.

THE COURT: All right. Complete this, the idea that the search was conducted an hour or so after the arrest and that it was conducted at a different place, and that they

conducted a general search of the baggage.

MR. BELDOCK: Yes.

What I am stressing above all is

Mr. Levine's testimony he was not searching

for weapons, by his testimony, he was searching

for evidence.

That kind of a general search, and I repeat, he was not making an inventory or pretending to make an inventory, that kind of a general search is beyond anything permissible and that's what makes this case very unusual. When you come down to the specific facts, and your Honor has several times posed questions to the effect, well, would you be arguing, and then you would say some general thing about an officer doing something in any case, but I am arguing these unusual facts that are established through Mr. Levine's testimony, and there, I think, we are entitled to suppression.

THE COURT: Let's go to the arrest of Mr. Davis.

MR. BELDOCK: Can we combine, take up the question of standing first, because it was a question we ended with?

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THE COURT: All right.

MR. BELDOCK: I am prepared to analyze the Brown case sentence by sentence in relation to this case, but I think it might be appropriate before we do that, so that we can all understand what is involved here, if we can ask the Government, through your Honor, whether it is claiming that the 3 grams seized on June 18 are part of the 5 pounds alleged in counts 2, 3 and 4 of the indictment.

We think that is a fair and essential question, because if the Government is claiming that those three grams are part of the 5 pounds --

THE COURT: They don't. They made that very clear.

MR. FRIED: There is no question about that, your Honor. The Government's position is not that they are part of the same, that there is 5 pounds at Kennedy Airport on the 13th of June, and there was a small quantity of cocaine on the 18th of June.

THE COURT: I don't know how the case will develop, and I assume that both lawyers, or the three lawyers know more about it than

I, but there is always the possibility of imposing criminal liability for the substantive crime under Pinkerton, which, in effect, says where the conspiracy is established, the defendant is shown to be a member of the conspiracy, then he is responsible for the substantive acts, if he was a member of the conspiracy at the time, whether or not he knew about it.

MR. WALL: I think the question is a little more particular, your Honor. I'll give you an example.

Suppose Davis were to testify that he brought back --

THE COURT: Do you care to say whether Davis will testify?

MR. WALL: He will.

MR. FRIED: Davis will testify.

MR. WALL: Suppose Davis were to testify, as he will not when I talk about details, that he brought the bags back and gave one back to Ornitz and one bag to Freeman and that beforehand, both Ornitz and Freeman knew that there was cocaine, a gram and a half in each --

that.

MR. FRIED: He will not testify to

MR. WALL: That is my example.

(Continuing) Would there be a conviction under counts 2, 3 and 4 based solely on that possession? That is my point. They possessed, then --

THE COURT: Not on the possession. Let me see, first of all --

MR. WALL: Forget about now the conspiracy count, that is a different proposition.

THE COURT: Normally I would ask the Government to sever the conspiracy count.

This may be one of those rare instances where it may not be fair to direct them to do it.

MR. WALL: My point, your Honor, is that

I want, both in connection with this argument --

THE COURT: There must be proof as to when Mr. Freeman joined conspiracy. If there is none, then even under Pinkerton, a conviction cannot stand because that is the additional element that must be proved in order to impose criminal liability under Pinkerton.

I think that is the crux of it, if that

is the is the theory of the Government liability.

We are talking in a vacuum here.

MR. WALL: I think Mr. Beldock and I have a pretty good idea of what the Government's theory is.

THE COURT: You never know what will develop. Even though we have wide and broad and liberal discovery here, and I understand that you believe you know everything about the Government's case, there may just be a little testimony that might make a difference.

MR. WALL: It always happens, doesn't it, your Honor?

THE COURT: I don't like to speculate on that.

MR. WALL: Counts 2, 3 and 4 charge possession of 5 pounds of cocaine. I want to make sure that it is not the Government's theory that possession of the 3 grams, which conceivably could have been brought in on the same plane, is included in that five pounds.

THE COURT: Mr. Fried, I think you'd better answer that.

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MR. FRIED: I will answer that.

The Government's theory, your Honor, is that the possession of the 2 point or 3 grams of cocaine is only one of the incidents to establish a conspiracy.

THE COURT: The question is, do you have any proof at all that these three grams were part of the 5 pounds imported?

MR. FRIED: They are not part of the 5 pounds.

THE COURT: They couldn't be because the 5 pounds were seized.

MR. FRIED: I have no proof of that.

THE COURT: It can't be part of the 5 pounds seized. Are you asking another question?

MR. WALL: Sure.

Was it part of the 5 pounds imported? THE COURT: Was it imported at the same time or from the same source. Were there 7 pounds originally given to Rudner and Tambini and is the Government saying that of those 7 pounds, 5 were taken from -- taken by Tambini and 2 by Rudner, and of the 2, only

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3.2 grams remain?

MR. WALL: I don't believe that is what the Government is saying, but I have a very simple question to Mr. Fried. If you put the three grams into Ornitz pocket, do you get a conviction on counts 2, 3 and 4? My understanding is no, all you do is you get evidence --

THE COURT: You are asking for an advisory opinion and I don't give that.

MR. WALL: I am not asking your Honor, I am asking Mr. Fried.

THE COURT: You are asking him if you get a conviction?

MR. WALL: I don't think he could because that's not the possession charged in this indictment, it is evidence.

THE COURT: I don't think I would allow Mr. Fried to answer that. If he wants to tell you privately what he thinks, that is one thing, but I am not going to allow the Government to take a position on that.

MR. FRIED: I can't take a position --I mean I will not.

MR. BELDOCK: Then let us go to the question --

THE COURT: Why don't you talk about standing very briefly. If I find that the arrest of Mr. Davis was lawful, I am not even going to discuss the question of standing -- then what's the difference?

MR. WALL: By arrest you also include the subsequent search, because the arrest might be lawful and the --

THE COURT: The same thing, then we have the same problems we have with Mr. Freeman's search.

MR. BELDOCK: We have arguments on each of those points, your Honor.

THE COURT: Surely.

MR. BELDOCK: I don't know whether to go to the question of standing or the question of lawfulness of the arrest first.

I think standing is fundamental and we have to go there first.

Now, your Honor cited Brown, and we believe that Brown is not applicable or controlling. I have analyzed Brown very

on a very, very different set of facts involving the seizure of goods from the store of a co-conspirator.

THE COURT: Incidentally, Lipscomb has a very significan statement --

MR. BELDOCK: I will rue the day that I ever gave you the case, Judge.

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THE COURT: No, you have not hurt your case because this was the impression -- this is what I was reaching for in talking about the pretext of a search. And they talk about the propriety of a stationhouse inventory, personal property.

In other words they understand, as I do, that the police do not need to make an inventory on the spot of an arrest. It is just impractical. It is a normal procedure to come to the stationhouse and make such an actual inventory:

"...nor are willing to say that the possibility of a pretextural search is so great in a case such as this as a matter of law we must condemn the concept of the stationhouse inventory..." --

MR. WALL: But this was not an inventory.

Mr. Levine clearly said it wasn't an inventory. He was searching for evidence pure and simple. That is this case. And that is why we --

THE COURT: So you say he should have announced that we are making an inventory and

 announcement.

then it would have been proper.

But to put it down --

THE COURT: That the place of search was properly the stationhouse and not the street --

MR. WALL: No. We didn't ask for just an

MR. WALL: For an inventory search.

THE COURT: We will talk about the purpose later. I will come across that while you are arguing. I will try to read Lipscomb.

MR. BELDOCK: I would like to take Brown up following the opinion from the beginning.

THE COURT: I think the things I am
going to refer myself to are the most important
things or are considerations -- the Court notes
first that in the pretrial hearing in Brown,
the defendant did not claim, they did not allege
propriety or possessory interest in the store
or in the goods and no such evidence, the Court
says, and no such evidence was introduced.

Therefore the district court denied the application for suppression for lack of standing.

We have taken the position that there

is a possessory and propriety interest of Stanton Freeman in the bags of Rosalys Rudner that were seized on June 18th.

THE COURT: Where is that in the evidence?

MR. BELDOCK: And evidence was introduced which in good faith I thought, and Mr. Wall thought, was more than sufficient to establish that situation.

Now, I do not know of any reason why the information has to come from the client's testimony. We have before your Honor the Government's position regarding this bag, that according to the hotel, a phone call was made that afternoon regarding someone coming to pick up the bags for Rosalys Rudner.

That Mr. Davis came down later that afternoon with the money given to him -- because I brought this out -- given to him by Stanton Freeman, to pay for the bags.

Stanton Freeman, according to the

Government's testimony from Mr. Levine, according
to the information they have, had directed

Jock Davis to go to pick up the bags with the

money, pay for the bill, bring the bags back to Stanton Freeman. In fact, that is what happened.

I see Mr. Davis as purely a messenger, a mule, if you will, in this transaction on the case that is here. That is, on the evidence that is here. He takes Freeman's money. He gets Freeman's instructions, goes down to the hotel. Then he identifies himself appropriately. And then there are several transactions that take place at the hotel.

Ascertains the amount due and pays for it, receives the bags --

Let's assuming standing --

MR. BELDOCK: I was prepared to say something -- Since last night Mr. Wall and I have discussed it -- if there is any question on those facts about standing I will be ready to put Mr. Freeman on the stand and fill in all details about the bag on this hearing.

we didn't hold him off the stand for any mean tactical reason. We only did it for the economy of the Court because we thought that the record was sufficient. The same

story Mr. Freeman told the Government as far as this is concerned, I believe is going to be told here --

THE COURT: Mr. Levine told the Government.

MR. BELDOCK: That Mr. Freeman told the Government. I am saying that we have already divulged our story to the Government and the Government --

THE COURT: Well, I don't know that.

MR. BELDOCK: No. Well, I am saying --

THE COURT: I am talking about the testimony of Mr. Levine.

MR. BELDOCK: Oh, on the testimony of Mr. Levine, I think there is sufficient. But since the -- you have had discussions about this before, about the admissibility of Mr. Freeman's statement in the U.S. Attorney's office. And all I am saying, your Honor, is that we have no reason to hold back his statement from this hearing except for judicial economy, because if we have standing --

THE COURT: Let's go to the lawfulness of the arrest of Mr. Davis.

MR. BELDOCK: Well, may I point out to your Honor before I address myself to that

Well, there was so much more to go on the argument -- but I think you are right, I should go to the question of lawfulness.

THE COURT: You can't do better than that.

MR. BELDOCK: I think Jones controlled in this situation, regardless of anything else. If we have to argue that we will.

Now, the lawfulness of the address. You see, this is where your Honor started to make findings yesterday, and where we ardently urged the opportunity to argue this today, because we think that your Honor mistakes the question.

And that you do not have here a situation where it can be claimed that the search of the Rudner bag was incident to a lawful arrest of Davis.

Now first let's take the question of the lawfulness of the arrest, although I think your Honor has indicated --

THE COURT: It is critical.

MR. BELDOCK: It is a critical issue.

It is not the critical issue because if Mr.

Freeman has standing as the facts show, and

if it is the Government's intention, as we know it is, to prove against Mr. Freeman the contents of those bags, his knowledge of the contraband, and to make the case against him based on that fact, we are the aggrieved party. We have a right to argue regarding the arrest and the search.

And the question is not merely whether the arrest is lawful, although it is critical, because if it is not, perhaps your Honor would throw it all out. But we don't have to prevail on that point. The question is whether the search was lawful.

THE COURT: Do you concede that the arrest was lawful?

MR. BELDOCK: No. Absolutely not.

Here are the facts --

THE COURT: I think you have little to argue on that. I respectfully submit to you that you must conceive the standard --

MR. BELDOCK: Standing?

THE COURT: The standard.

MR. BELDOCK: Oh, I am sorry.

Well, perhaps I do.

I just recite to your Honor that Levine arrested this man by his testimony -- I'm only dealing with the stestimony, sir -- he said for conspiracy to import drugs --

THE COURT: Oh, I don't care what he describes it as.

MR. BELDOCK: I understand. His only information --

THE COURT: -- If he had probable cause to believe that a narcotics violation was then and there being committed.

MR. BELDOCK: Absolutely not.

THE COURT: At the time.

MR. BELDOCK: Absolutely not. His only information --

THE COURT: Absolutely not?

MR. BELDOCK: Absolutely not.

THE COURT: Why is that?

MR. BELDOCK: Because I represent his testimony as we got it here yesterday -- his only information regarding Davis is that the call has been made for a man to come down and pick up the bags. That this man came and identified himself, paid, signed, received

and went with the bags. That is his only information regarding Davis. Now, his only evidence regarding the Rudner bags comes through Tambini. It was -- I will put it at its greatest from the Government's point of view -- it was that Rudner was a co-conspirator in the importation scheme, had joined Tambini and Rudge in the plan. Had given two other bags with all the known coke. I repeat, the 5 pounds, all the known coke to Tambini in Buenos Aires. Had come in on the plane with Tambini. Presumably saw her arrested and then fled the airport.

Specifically the Government had no information or source of information to lead anyone to believe on any probable standard, that Rudner had cocaine or contraband in her bags.

(continued on the next page.)

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The Court cannot infer such a fact simply because Rudner was known to be an importer in this scheme and had left the hotel, leaving bags, the Court has no evidence from which to infer that.

And the important thing is not whether the Court does but the agent had no basis. And the agent said -- he said yesterday that I had no knowledge.

And no thought was expressed of any cocaine or contraband in that bag. He had no such knowledge even after he took Jock Davis into custody. And even after he spoke to Mr. Freeman when they examined the bags later on that was the state of affairs.

Now, your Honor --

THE COURT: The question was whether he knew that there was cocaine in the bag. That is not the standard for probable cause.

MR. WALL: No, he was asked whether --

THE COURT: The question should have been whether he had probable cause to believe that there was cocaine in the bag.

MR. BELDOCK: Your Honor, he had no

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information at all to indicate it.

MR. WALL: That is correct.

THE COURT: That is different than asking whether he had probable cause to believe.

MR. BELDOCK: Well, your Honor, that is a conclusion.

THE COURT: That is right.

MR. BELDOCK: I have established for your Honor all of the facts -- a conclusion would not be proper -- I established all of the information he had concerning Rudner's bags and Tambini --

Rudner was deeply steeped in the narcotics business. She was a professional. She was the one that arranged the entire importation. That is, she observed Tambini arrested. That she checked into a hotel a few hours after the Tambini arrest. That she then quickly left the hotel, abandoned the room. They held it under surveillance from the 14th until the 18th. That those bags were suspect.

Why do you think he waited for the person to pick up the bags? I believe that if Mr. Levine did not arrest that person he should have gotten

as an experienced customs agent that he was, he should have inferred in all probability that there was cocaine or some drug in those bags. And the surreptitious manner in which those bags were going to be delivered to someone indicated that a crime was being committed.

MR. WALL: Your Honor, the one point that I would make with respect to your recitation of the facts: It is quite obvious that Miss Tambini was a mule. She was the one who was put up front. Let's go along with that.

Here is Miss Rudner. We are talking now about the proposition as to the likelihood of cocaine or any other drug being in those bags.

You give the drugs to the mule. You free yourself of the physical possession of them. The mule gets picked up. She has got five pounds of coke. Says, it was Rudner that gave me all of this. If I had to put my money on one proposition or another I would put it that Miss Rudner was clean. That was the whole purpose of having Miss Tambini —

THE COURT: Well, there are other possible crimes, and if you want me to list them, harboring a fugitive. And whoever went to those bags might

very well have done so at Miss Rudner's request.

Accessory after the crime was committed. Not only
narcotics but I say that Miss Rudner, a fugitive,
wanted to get rid of the evidence, the incriminating
evidence, and the incriminating evidence being
drugs.

And what she left behind, she left behind because of the situation. So whoever picked them up was part of that crime.

MR. WALL: Assuming for the moment, your Honor --

THE COURT: I might say that Mr. Beldock argued yesterday that the proof in the hearing was that Mr. Davis had no knowledge and therefore was really not committing any crime --

MR. BELDOCK: That is the proof in the hearing.

THE COURT: But I am happy to say that he did not advance that argument today because we are talking about probable cause to believe that a crime was being committed at that time and from the eyes of the arresting officer and not the actual fact. Who knows what the actual facts are.

MR. WALL: Your Honor, on the assumption for the moment that the arrest was a lawful one, we have some problem here with respect to a search some three hours later --

THE COURT: I will say I am having little difficulty in finding the arrest unlawful.

The next question again is the search that was conducted of the two bags. This was done when?

Three hours later?

MR. BELDOCK: It was done three hours later.

But the first point we want to make about that,

your Honor, is that it is not a search of Davis'

property incident to an arrest of Davis. This

is where we think this is an unusual case and

where we think that a very different result must

pertain.

THE COURT: If it is not a search of Davis' property, what interest do you say he has in those bags?

MR. BELDOCK: My point is that the government knew -- from the government's point of view they were arresting a man who was in full view continuously with Rudner's bags.

Now, this is essential to an understanding

of why this search is legal.

I think I would like to go down the arguments, but I want to make that point clearly before us --

THE COURT: Is this any different than the argument you made on the search --

MR. BELDOCK: Yes, much different.

I mean that the government knew that Davis had picked up bags belonging to Rudner. These bags had been under surveillance for days. Under those circumstances the government cannot claim that the search was incident to an arrest. They absolutely have the obligation to get a search warrant. They could have searched at the time of arrest. Perhaps aside -- aside from that argument which I say is the threshold argument --

THE COURT: You mean if it is Freeman's bags they can't search property in possession of --

MR. BELDOCK: Judge, it has to do with the justification of a search incident to an arrest.

And what does that mean?

And I am saying at the threshold there are two things that make it factual under a search incident to an arrest of Davis.

1. That the government had these bags under

a search warrant at any time if they could have obtained obtained one.

The justification for a search incident to an arrest is personal safety and exigency, emergency situations, necessity. None of those circumstances exist here.

Under the law because of those circumstances this search of those bags is not a search incident to Davis's arrest.

THE COURT: Do you think there is anything to the government's argument that these bags were really in the possession of the hotel and the room was abandoned and therefore they had a right to search?

MR. BELDOCK: I don't know because it doesn't matter, because you see the fact is that they turned the bags over. And the man paid for them and got the receipt.

I really haven't addressed myself to the hotel question because my position is that under the basic facts I have just outlined the government when they got the bags from Davis and when they looked in them about three or so many hours

later, were in no better position than they had been before Davis picked them up.

THE COURT: Mr. Fried, do you cite the case you say gives the right to search luggage that they seized pursuant to an innkeeper's lien?

MR. FRIED: I didn't bring it down. I can have it for you in a few minutes. It's United States against Clark or something, 394
Fed. I just don't have it with me.

THE COURT: United States against Clark in 394?

MR. FRIED: I think it is 394 but I am not sure of that. I have it on my desk. I assumed we weren't reaching that question at all. But I do have it.

THE COURT: It is hard for me to believe, that is all. What circuit is that?

MR. FRIED: It is the second circuit. It is a Second Circuit case. The Second Circuit held -- I described the case to you and I will call you or I will bring the case right down.

THE COURT: Yes.

MR. FRIED: It turns on the New York
State Property Law which gives a hotel the right

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to seize property.

MR. WALL: Well, whatever right did exist, your Honor, was lost once the phone call came in to indicate that somebody --

MR. FRIED: Your Honor, may I say --

THE COURT: It is an interesting argument. But I want to know why they should have the right to search at some time and then should have lost it because they turned the bag over.

MR. BELDOCK: It would have been the right of the hctel to search it, Judge, at best.

Now the arguments I have just advanced are threshold arguments which differ from the usual case.

Aside from those on the facts, this is not a search incident to Davis's arrest.

They could have searched at the time for personal safety reasons or for whatever other reasons. They didn't. The search took place after Davis was arrested and after Davis was sent down and didn't take place except hours later. It is a pure evidentiary search with ample time, your Honor, and no reason not to secure a warrant.

THE COURT: Where was it made?

MR. BELDOCK: It was made at their headquarters, I understand, hours later.

THE COURT: Where do you think it should have been searched?

MR. BELDOCK: It shouldn't have been searched. They should have secured a warrant.

THE COURT: I mean, for weapons and bombs.

MR. BELDOCK: No, Judge. These hotel bags -your Honor, these bags are sitting in a hotel
room for days. They have them under surveillance.
They have the bags in their safety. They have
taken them away from Davis. The re is no -- you
know, there are all kinds of cases. We are
dealing with this case. In this case there is
no question about personal safety or examinati on.
They have the same obligation to get a warrant
they always do.

THE COURT: If it is not personal safety there is no reason to search?

MR. BELDOCK: I am saying that under these circumstances they had no right to search. No right to search those bags. And that they were required to obtain a search warrant.

THE COURT: In other words, once it is out

of the control of the defendant they must get a search warrant in every case to seize property?

MR. BELDOCK: Well, your Honor keeps saying every case and I then have to hesitate because I have to think out every circumstance. But that is the general principle as far as I understand it.

It is as your Henor just stated it -THE COURT: If you are saying that is
the only reason, that is, to remove the danger
to the arresting officer, then in every case
where the arrestee is out of control of the item
seize, then no right to search exists and they
must get a search warrant.

MR. BELDOCK: Assume the case, Judge, where the bags they take, which is not this case, and they have taken the defendant away some place, and they hear a ticking inside -- now, I can't say in every case because there are circumstances like those. But if there is no legal basis --

THE COURT: All right, if there is no situation when they hear a ticking, then they -- MR. BELDOCK: If there is no legal basis,

your Honor, to search, it is not created by the fact that they arrested Davis here because it is not a search incident to an arrest. It is not a search on any other legal basis:--

THE COURT: If it is not incident to an arrest you are saying they couldn't search because it wasn't Davis's property but rather Freeman's property --

MR. BELDOCK: Yes, it was Freeman who asserted dominion over that property of Rudner. That is right.

THE COURT: The mere fact that Davis had actual possession was nothing.

MR. BELDOCK: Well, I treat him as an agent on the facts before you and I do not think we can really argue about it. I think it is very clear. That is why we thought it was so clear that Freeman had standing on the government's case --

THE COURT: So even with a search warrant -
MR. BELDOCK: If you had probable cause
to search it, yes. If you could establish it
before a magistrate.

THE COURT: What would you have established before a magistrate?

MR. BELDOCK: If you have a reason to believe that they were instrumentalities of the crime or contraband. The things you would have to do under the statute, you would have to come and make a showing, Judge. You would have to make a showing.

Now, there are cases, of course. We have had an opportunity to do some research. Of course, many of the cases are well known to your Honor.

I think the principles of Shimmel and of Preston against the United States apply really to the latter half of my argument without any doubt.

Justifications for the search are absolute in a search with respect to time or place.

Once an accused is under arrest and in custody, then a search made at another place — that was in Preston — without a warrant is simply not incident to the arrest.

And the circumstances are the same here.

The fact that they are talking about another

place being another dwelling doesn't change

the circumstances. The bags were in their

custody. No one was going to take them away.

This is very standard stuff as far as we see.

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No danger. And no emergency destruction of evidence, Judge.

You see, those are the two things that I think exist under the cases.

There is a case of United States against Colbert. And, again, I sincerely regret that I haven't had an opportunity to Shepardize this case. It was a 1972 case, fifth circuit. I read from the headnote, which is sufficiently explanatory here, Judge, and interesting if not completely on the point, very closely analagous, where the defendants began walking away from a police car and placed their briefcases on the sidewalk as the officers approached them. And after questioning and frisking the defendants started to walk away from the officers, leaving the briefcases behind. And the officers then arrested the defendants for failure to possess Selective Service cards and placed them in the patrol car. A warrantless search of the briefcases while defendants were in the patrol car could not be justified for prevention of concealment or destruction of evidence, nor of the search for safety of the officers, nor as a search contempor-

aneous to a lawful arrest. And the search was invalid. That case is at 454 F. 2d 801.

It is an analysis of the Shimmell standard and the Preston standards.

There are many other cases, your Honor.

Let's see if I can find one other that might be pertinent to our consideration now --

THE COURT: Well, on searches and seizures the statement of the general principles of law is not too helpful. They must always be read in the contest of a detailed statement of the facts.

MR. BELDOCK: That is correct, your Honor.

THE COURT: I might say it would have been a lot more helpful if the motion had been made a long time ago within the time provided for in the rule to afford me an opportunity to go into it more thoroughly. My staff and myself have gone into this very carefully and we think one or more substantial questions are raised.

Would you like to say something?

MR. FRIED: Certainly I would, your Honor.

THE COURT: You have remained quiet for almost an hour.

MR. BELDOCK: May I say, your Honor, that we recognize that had this been another world and at another time we would have all preferred to put this issue on with briefs. And I mean all when I include the assistant United States attorney.

We have worked under inordinate time pressures. We were approaching the case, without going into details, from another point of view and using our time heavily for developing it. Therefore, though we did serve notice of motion, your Honor, and it was served timely, we failed the Court in that respect.

THE COURT: It was served timely?

MR. BELDOCK: I believe so.

THE COURT: When was that?

MR. BELDDCK: Well, as soon as we came into the case --

THE COURT: You came in on August 9th.

MR. BELDOCK: Yes, but I understand the time for motions was adjourned to a subsequent date. We served a motion, a notice of motion to suppress.

MR. WALL: Yes, August 17th .

MR. BELDOCK: Then there was general agreement, as I understand, that all those motions would take place beforehand. But I do not rely on the notice, your Honor, because --

THE COURT: That is your motion to dismiss the indictment; is that right?

MR. BELDOCK: There is a one-page motion.

THE COURT: That is to dismiss the indictment.

MR. BELDOCK: No, there is another one where we refer to statements and tangible property. But I take no solace in that, Judge, because --

THE COURT: There is no affidavit attached to it.

And/or suppressing any wire taps?

MR. BELDOCK: We had thought at that time there were wiretaps. It was before we had as many facts as we do.

THE COURT: That is all it says, is wiretaps.

MR. BELDOCK: Tangible property. The last paragraph, Judge.

THE COURT: When was the time for motions extended to?

MR. WALL: August 17. That is my recollection.

THE COURT: It looks like a usual routine motion that a lawyer makes, a shotgun motion, hoping that

maybe something will happen. So it awaits the day of trial.

All right, I will hear Mr. Fried.

MR. FRIED: Initially, your Honor, I would like to note that I too worked late last night researching cases. And as I left the Court House at about eleven o'clock I came across the case of United States ex rel. Muhammad versus Mancusi 432 F. 2d 1046 1970, a per curiam opinion written on the second circuit, panel Judges Waterman, Friendly and Hays.

THE COURT: We have it. May I see it?

MR. FRIED: Your Honor, this addresses

itself both to the point of the search of the

briefcase and the point of the search of the

suitcases.

That case, which was decided post Shimmel, distinguishes Shimmel and distinguishes Preston and holds that in a situation where a briefcase was seized by the FBI from the defendant in front of a bank, that it was proper to search that briefcase several hours later at a subsequent period of time at the bank -- at the police station.

THE COURT: ay I read just one significant statement?

MR. FRIED: Please, your Honor.

(Continued on next page)

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THE COURT: Because I asked you this question — the examination of appellants brief appears that at FBI Headquarters it presents no different constitutional issue than a search there of his suit pockets, etc.

MR. FRIED: I think that case your Honor should dispose of the point dealing with the search of the bags and the search of the brief-case.

I do not think it is necessary for me to argue it at length. It is a very recent case. I had jeopardized it. But there is one reference to it which is not locatable. There is a wrong cite but it doesn't indicate anything under it. It is just a case cited in 466 Fed. 2d. 1030. That in fact is not a criminal case at all and doesn't cite it.

There is another case within the Circuit, United States against Caruso 358 Fed.2d. 184, a 1966 case. That of couse was pre-Schimmel. But in that situation the seizure of the defendants clothing and search of his clothing six hours after arrest was held not improper. The Court again distinguished the Preston case in the

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particular facts.

THE COURT: That is cited in Muhammad.

MR. FRIED: Yes. I looked at Caruso first and then I went on to Huhammad.

I should for the interest of complete candor state that there is a contra opinion in the Sixth Circuit which says that we do not agree with the result reached in the Second Circuit. That is United States against Edwards 474 Fed 2d. 1206, a very recent case.

But they discuss the case that I have given to the Court and point out that apparently it is the law in the Second Circuit. But I would only argue that in the Mancusi case the Court said that such a claim as this is frivolous.

THE COURT: Well, I might say that I am surprised by the paucity of authority on the issue raised. I can only account for it on the assumption that lawyers generally felt there was no point so they didn't raise it. That is not always so.

MR. WALL: Or that it is so outraceously unconstitutional that very few officers do it.

THE COURT: Or that Counsel is so incenious and resourceful that they see it where others do

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not.

MR. WALL: I prefer that actually.

THE COURT: I have got it on the record and the clients are here so we are all happy about it.

(continued on next page)

MR. FRIED: Your Honor, for the sake of completeness, the case that I referred to laterearlier, rather, in the Second Circuit concerning the search of a hotel room, property that's been abandoned in a hotel room --

THE COURT: I am sorry. You will have to repeat that.

MR. FRIED: The case that I referred to earlier, which -- the Second Circuit authorizing the search of property abandoned in a hotel room under circumstances such as this, which I apologize for not bringing down, -- I didn't think we had the issue -- is United States against Cowan, 396 Fed. 2d. at Page 83. That's a 1968 --

THE COURT: I asked my clerks to find United States against Abel and they did --

MR. FRIED: Abel will lead you to the Cowan case.

THE COURT: I see.

MR. FRIED: And then turning to the arguments on the facts, I would --

THE COURT: Before we move on to the other,

I think it is interesting to cite what - the

heart of the resolution of the issue from Muhammad

against Mancusi.

"Appellant recognizes that the warrantless search of the briefcase and the seizure of the money orders would have been proper if the search had been conducted at the time of his arrest in the lobby of the bank, but he claims relying upon the rule impressed" — and then the citation — "...reaffirmed in Chimel against California, that the Government was foreclosed from searching it and seizing its contents without a warrant after he and the briefcase had been removed from the scene of the arrest."

And that's the position they reject. So there goes a good part of the argument.

MR. BELDOCK: That only has to do with

Mr. Freeman's bag and that is not contrary, basically

contrary to what I said, your Monor. Remember

we stressed the particular facts of this case.

THE COURT: Is that what you were saying all along?

MR. BELDOCK: I said, your Honor, that there are cases that hold that you can come down to the precinct, having taken the bag into custody, and

if you have a right to search you look into the bag. The same standard still exists as to what places you have to look into it and the evidence here shows that he was making a general search, etc.

THE COURT: Give Mr. Fried some additional time. He's a lawyer and is impatiently waiting for one hour. You know how difficult that is, to listen to other lawyers for one hour and say anything.

So goahead. You have your say.

MR. FRIED: Thank you, your Honor. I'd like to note that the proprietary interest claimed in the bags by Mr. Freeman now was denied at the time that the search occurred. In other words, we are dealing with the probable cause as it was in the minds of the agents when they conducted this particular search. And it should be recalled that Mr. Levine testified yesterday that when he presented the bags and Mr. Davis to Mr. Freeman, Mr. Freeman said he knew nothing about them.

So then when Mr. Levine took Mr. Davis down to 201 Varick Street and searched through Rosalys Rudner's bags, there were bags that Freeman himself

having denied any proprietary interest in --

THE COURT: No, I don't recall that testimony.

You say that the testimony is that after Davis'

arrest, he took Davis and the bags to Freeman

and Freeman denied it?

MR. FRYED: Mr. Levine --

THE COURT: Do you agree that was in the testimony?

MR. BELDOCK: Yes, the initial testimony.

THE COURT: I don't have the transcript and I'm just --

MR. WALL: Denied ever having seen Davis before. That's the testimony.

THE COURT: Yes.

MR. BELDOCK: Later at the same interview he admitted having seen Davis. That's part of the testimony.

THE COURT: When did the search take place?

MR. WALL: An hour and a half, two hours

later.

MR. BELDOCK: Several hours later.

THE COURT: But during the period of time where the denial stood, right?

MR. BELDOCK: Yes, during the period of the

time when the denial stood, your Honor; but their evidence, the people's evidence was that he has a possessory right. They were going on that theory. There is no question about it.

Besides, that's not relevant to the issue of standing today.

THE COURT: It wouldn't matter what he said at the time. It might bear on his right to search,

MR. FRIED: The cause of searching.

THE COURT: Yes.

MR. FRIED: If -- on the standing issue,

I would go back to the -- without reading it, I -as the Court has at length, the Brown case. The
Brown case merely holds and clearly holds that in
this situation, where the essential element of
the crime is not the possession of these bags
but that these bags are merely evidence leading
to an inference that the conspiracy -- one of the
inferences leading to the proof of the conspiracy,
that it's not a Brown -- it's the Brown situation,
that they are not the possessory -- it's not a
possessory crime. Therefore, the defendants
have no standing to object to the search.

THE COURT: Well, that's what I held in a

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case that I can't find, about a year and a half ago. All I remember, it was a case out in Jackson Heights. It involved the -- Dutch Master Cigars, where the Government came in and conceded that the search of the premises was invalid and the only question was standing, because if the defendants who were there with a trailer truck, ready to pick up the Dutch Master Cigars had standing, I would have to find it invalid as against them.

I looked at the specific charge, and the charge was possession. I analyzed all the cases that have come to my attention and it was a very close question, and found that, indeed, they had standing and the search was invalid as to them and I dismissed the indictment.

It was affirmed. I don't know whether it was affirmed with or without opinion. I don't know whether you were here and I can't locate that case.

MR. FRIED: I can locate that. I wasn't here.

THE COURT: About a year and a half ago.

Do you remember the name?

MR. FRIED: I don't, but I can find out.

THE COURT: I am trying to recall the name of the assistant who was so disappointed. I do know that Elliot Whales was the -- represented one defendant.

THE CLURK: Mr. DiPaola?

THE COURT: No, no. It could have been Mr. Puccio. I'm not sure.

All right. It may have been Organized Crime Unit.

MR. FRIED: I can find that out, your Honor.

It would have come to our Appeals Section.

THE COURT: It would be too late for this,

I'm sure, but I recall what I said there and I

concentrated on a specific charge.

MR. FRIED: I think that that's the analysis that is required by the Brown case.

THE COURT: And I thought Brown seriously undercut Jones. I don't know. They didn's say that they were overruled in Jones. They said that they'd leave that for another day in a proper case. In the proper case they may overrule Jones.

MR. WALL: The --

THE COURT: At any rate, I am assuming

cause there is no question in my mind that there was probable cause to arrest. I would say they should take all the stars they gave Mr. Levine away if he hadn't arrested the individual who picked those bags up. He was definitely in it. He had probable cause to believe that.

Is there anything else you'd like to say?

MR. FRIED: Your Honor, if you are assuming standing, then I rely on the case that I have cited to the Court, to resolve the only outstanding issues: that is, being the search of the bags and the search of the briefcase.

THE COURT: All right. Now, on the facts

I found as previously recited into the record,

I find that the arrest of John --

MR. BELDOCK: Judge, I do not want to interrupt you, but we had left over one question for argument, the insufficiency of the warrant.

THE COURT: I beg your pardon. Oh, that's most important.

MR. BELDOCK: We have failed to go to that.

THE COURT: I think that's the most difficult question. You're absolutely right.

(continued on next page)

GR:pc take 3/22

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MR. BELDOCK: I have a very short argument on that, Judge. I askyou, if you were sitting as the commissioner, with that affidavit in iront of you, in regard to the question of Stan Freeman, would you not have required more to determine whether there was probable cause that a crime had been committed by Freeman? And I suggest to your Honor, if you sit as a commissioner and you examine that, without any hindsight, just what's on that affidavit, and hindsight judgment is not permitted, then all you have is a bare conclusory statement regarding Freeman, stating nothing that would give rise to knowledge or participation, except that he sent for the bags, that's all there is.

Your Honor, as a commissioner, would have required more. Any commissioner should have required more, if it had been clearly brought to his attention.

THE COURT: Strangely enough, we must be thinking the same, and so the question I asked myself was this: If Mr. Davis were to appear before me and say what he said in his

affidavit, but I find probable cause, and you and I differ as to the outcome. I would have said yes, and for this reason.

First I might say that I have the

Tambini statement, which was marked in evidence,
but I do not have, at least before me, the

warrant and the affidavit.

THE CLERK: It was marked as a defendant's exhibit, your Honor.

THE COURT: It was marked.

I do have it now.

All right.

For these reasons, under Aquilar, explicated by Spinelli, the two tests for the -- the dual pronged test is a reliability of what is called in those cases the informant and then the reliability of the information.

I went back to Spinelli and then I read what was -- what I regarded as significant in Mr. Justice White's concurring opinion, some statements that really refer to the degree of participation or the participation of the person supplying the information.

Now, someone who makes statements

against his interests, implicating him -- and I say in a variation of that, someone who is implicated -- certainly is a reliable source of information.

Sometimes, sometimes we get it from the details that the informant gives.

and that's 393 U.S., 410 and 89 Supreme

Court 584, at page 425, Supreme Court, and

593 -- I mean, U.S. and 593 Supreme Court,

said, "The other basis for accepting the

informant's report is more complicated but,

if, for example, the informer's hearsay comes

from one of the actors in the crime, in the

nature of admission against interest, the

affidavit giving that information should be

held sufficient."

Now, here Mr. Levine didn't learn from admissions that Davis was an actor in the crime. He learned from what he observed.

MR. WALL: Your Honor --

THE COURT: We go into the affidavit and, incidentally, I might cite Ventresca too, to indicate what Judge Goldberg said

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about interpreting affidavits.

They shouldn't be interpreted in a -what he called, as I recall it, a stiff, rigid,
mechanical manner, but in the light of reason
and common sense.

These affidavits, usually are quickly drawn. That doesn't mean there is any excuse for not having enough information in them.

But, on the other hand, we shouldn't look at them as we might a contract that's been drawn after a lot of negotiation, dispute, questioning and finally arriving at the precise language.

Now, this affidavit clearly spells out Mr. Davis' implication in the crime. There is little question that he was a participant in the crime.

And then it says, in paragraph 9, the only statement implicating the defendant Stanton Freeman, a statement by the defendant John Spencer Davis to your deponent that he was instructed by defendant Stanton Freeman to pick up Rosalys Rudner's luggage at the Hotel Paramount, New York, New York.

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Now, it's brief.

When your question directed to me was would I have insisted on more detail, yes,
I would have liked more detail.

But that's not the question.

The question is, is this enough.

Now, it doesn't say a lot. But I say it says enough.

The statement by the defendant to

Mr. Levine said that he was instructed by

Defendant Stanton Freeman first to pick up

Rosalys Rudner's luggage and then specify

the hotel, at the Hotel Paramount, New York,

New York.

Now, just --if I had Mr. Davis on the stand and he told me all about his implication in the crime, and then the question was, did anyone tell you to pick up the luggage, and he said yes, and I asked him who, and he said Stanton Freeman, I say that would be enough on which to base probable cause to believe that Stanton Freeman was implicated, that he committed a crime.

But he said more than that. He said

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-- he said go to the Hotel Paramount and pick up her luggage.

Now, to me that shows that he had the information, the information was reliable, and certainly the source was reliable and always in retrospect could it have been better?

Of course.

Is it enough?

My answer to that is yes.

Now, having found the warrant, the affidavit upon which the warrant was based sufficient, I find the arrest lawful, for the reasons indicated in the case cited by Mr. Fried, Muhammad against Mancusi.

I find the search at the offices of the arresting officers an hour or an hour and a half later, reasonable.

Having found the arrest of John Spencer Davis lawful, I find that the search of his baggage approximately 2 to 3 hours later, at the offices of the enforcement officers, reasonable.

I find that the documents seized in

those searches are admissible.

I find that the Government proved beyond a reasonable doubt the lawfulness of the arrests and the reasonableness of the searches.

Further, I find that the Government proved beyond a reasonable doubt that the exculpatory statements made by the defendant Stanton Freeman were knowingly, voluntarily and intentionally made. If the Government offers the exculpatory statements and further testimony to -- intending to show that they were false, I will allow that testimony, and I will charge the jury on exculpatory statements later shown to be false.

The defendants have an exception to the rulings. Both defendants have an exception to the rulings.

We will now call a jury and select our jury.

MR. BELDOCK: May we have five minutes to consult, your Honor?

THE COURT: All right. Five minutes. (Recess taken.)

BS:pc take 4/1 (After recess.)

MR. BELDOCK: Your Honor has been advised that both defense counsel and clients which to waive the jury and try the case before your Honor.

THE COURT: I assume you have advised both defendants, Mr. Ornitz and Mr. Freeman.

You both understand you have a constitutional right to trial by jury?

DEFENDANT ORNITZ: Yes.

DEFENDANT FREEMAN: Yes.

THE COURT: You understand that if the case were submitted to a jury, the jury would have to arrive at a unanimous verdict based upon proof submitted by the Government that would convince the jury beyond a reasonable doubt of your guilt; you understand all that?

DEFENDANT ORNITZ: Yes.

THE COURT: Are you ready to waive your right to trial by jury?

DEFENDANT FREEMAN: Yes, sir.

DEFENDANT FREEMAN: Yes, sir, we are -- or I am.

DEFENDANT ORNITZ: Yes, sir.

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THE COURT: It will be a trial to the Court, is that correct, Mr. Freeman, Mr. Ornitz? DEFENDANT FREEMAN: Yes.

DEFENDANT ORNITZ: Yes.

THE COURT: You have consulted with

your lawyers about it?

DEFENDANT FREEMAN: Yes, sir.

DEFENDANT ORNITZ: Yes.

MR. FRIED: The Government consents, your Honor.

THE COURT: I will approve it. I have a form that requires the signature of each defendant and witnessed by his lawyer and the consent of the Government.

MR. BELDOCK: Sign all the copies? THE COURT: Yes, because each lawyer will get a copy and a copy will be filed.

The waiver of trial by jury has been signed by the defendant Stanton Freeman and the defendant Kim Ornitz and witnessed by Myron Beldock and Patrick M. Wall, consented to by Bernard Fried for the United States Attorney, and approved by the Court.

Please distribute the copies.

THE CLERK: Yes, sir.

THE COURT: Proceed, Mr. Fried.

MR. FRIED: Your Honor, I would like to make several applications at this point which -- before proceeding with an opening.

First of all, Mr. Wall and Mr. Beldock and myself, now that there is going to be a non-jury trial, have agreed to stipulate to large quantities of documentary evidence and chains of custody and various other types of information.

What we would like to do is request an adjournment of an hour or two to give us a chance to go through mutually, these documents and return, say, at 2 o'clock, and commence, at which time we will have all our stipulations prepared.

THE COURT: The case will continue at 2 o'clock.

MR. FRIED: Thank you, your Honor.
(Luncheon recess.)

AFTERNOON SESSION

BS:M

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THE COURT: All right, gentlemen.

MR. FRIED: Your Honor, before we commence, we have the Bruten issue which was raised initially when we had the jury in the case.

THE COURT: You are absolutely right, we still have it.

MR. FRIED: The statements of both Mr. -Mr. Beldock is aware of the statement that was
taken from Mr. Freeman in my office which certainly
put Mr. Ornitz at the vicinity and at the location --

THE COURT: I want to know whether the defendants would raise that question. I don't know whether it is applicable in a nonjury trial where the appellate court might think that the trial judge can separate the evidence and just charge the admission, if it is admissible, against the party making it.

MR. WALL: I would think that that particular item to which Mr. Fried just referred is cumulative, in any event, and certainly we will concede that Mr. Ornitz was there. He will probably tell you so himself. So I don't see that as a problem.

I would suggest on the Bruten --

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THE COURT: I want to know specifically that the defendants are waiving any claim of a violation of the right of confrontation, which really what is involved, in the introducti on by the government of a statement by Ornitz implicating Mr. Freeman and a statement by Mr. Freeman implicating Mr. Ornitz.

MR. BELDOCK: Do they have written notes?

My reaction has been that we are waiving. But

in the interest of good sense I would like to know

whether any of these statements were reduced to

notes, memoranda or reports so that we could

examine them, and if there is something appropriate

we would ask it be excised -- I don't think there

is anything --

MR. WALL: I was going to suggest, your Honor, that before Mr. Fried introduces what he believes may create a Bruten problem that the three of us, Mr. Beldock, Mr. Fried and myself could sit down and it may be that we could prevail upon Mr. Fried, in those areas that were questionable, to exercise his own good judgment so that we would not have a problem.

THE COURT: That is too indefinite.

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Mr. Beldock just suggested excising. I was reversed in United States against Poza when at that time I believed it to be the law and Judge Friendly said it was, but they are changingit.

MR. WALL: I think the excision in that case, when it took out an unfavorable reference to a codefendant, also emasculated an exculpatory statement in the total statement being excised; I think that was the reason for it.

THE COURT: That strangely -- I don't think any court has ever yet been presented with the question of whether Bruten applies when the trier of the facts is the Court.

MR. WALL: Shall your Honor preserve the issue?

THE COURT: We will have so many --

MR. WALL: I thought I would try.

THE COURT: How can I as the trier of the facts overlook the waste of trying two separate trials when I will know what each statement says when the trials are completed? Suppose I had them successively? If we had two separate trials it would be one thing, but you wouldn't argue a Bruten problem if you said to me we don't mind

the same jury trying the two cases and introducing the two statements, but --

MR. WALL: That may depend upon who gets tried first. If Mr. Freeman were to be tried first I take it that you would not hear evidence of what Mr. Ornitz had said but you would hear evidence of what Mr. Freeman said. Then Mr. Ornitz on the second trial would have that problem.

THE COURT: How can I avoid it? I have not seen the 3500 material, but I assume the 3500 material has everything they said about each other.

MR.FREID: That is not correct, your Honor. The problem that occurred here, it is only within the last week or ten days that each of the defendants respectively and individually accompanied by their counsel, in the presence of myself andcase agents, came in to my office and presented in detail their version of the facts as they understand them.

MR. BELDOCK: It was on August 15 and 16 in regard to Freeman, just to get the record straight.

MR. FRIED: And it was last Thursday in regard to Mr. Ornitz.

MR. BELDOCK: And Mr. Wall was out of the state a good deal of those times.

THE COURT: You intend to introduce both those statements?

MR. FRIED: Not in their totality, but there were admissions made during those statements that I intend to introduce.

THE COURT: Parts of the statement?

MR. FRIED: That's correct.

THE COURT: You will read from th e statement?

MR. FRIED: There are no written statements.

The agents will testify.

THE COURT: The admissions of each will not implicate the other?

MR. FRIED: On the part of one of them, if
the Court rules that the statement that was made
is admissible, and I recognize -- one of the
counsel argues, believes that it is not admis sible,
then that will serve to implicate both of the
defendants, perhaps. I say that because I don't
want to suggest to the Court in advance what we
are talking about.

MR. BELDOCK: We are talking about evidence, your Honor.

THE COURT: I understood that both defendants were going to be tried the same time. I just assume that when you waive trial by jury you are waiving the Bruten problem also.

MR. BELDOCK: I do, too. All I said before was, yes, that was my assumption and that is my position, but if there were any written statements I should examine them. If there are any notes that Mr. Sylvester was going to use regarding my client's statement, maybe I should examine them. Aside from that I waive the Bruten problem. I want your Honor to hear the whole case.

I should put this in the record in advance, as long as Mr. Fried just raised it, our position is that when the government introduces portions of the statement taken from Mr. Freeman, made by Mr. Freeman it is the government's obligation to introduce all of it, that they cannot pick and choose, and that is my position.

THE COURT: You want all of it in?

MR. BELDOCK: All of it in that is relevant to this case, all of it in that is admissible.

admission against interest may be offered. The only time self-serving declarations or the part of the admission that may be introduced by the party making the admission is to explain, modify or in any way alter the admission against interest. But, for example, if he said these were my bags, but I didn't know what was in it, there would be a serious question as to whether, but I didn't know what was in, because that doesn't modify or in any way change the fact that he said these are my bags.

In a nonjury case we are not so strictly limited, we can take chances and the parties just must have some amount of confidence in the Court, in charging only so much of it as is on the issue and admissible.

At times during the trial I will tell you that I will take it because there is some chance that it may be relevant, but if I find it is not, then I won't consider it.

MR. WALL: Just so it is clear, your Honor, that when you say, or when you ask whether we are waiving Bruten, I take it that you are not

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asking for any change in the normal rule that whatever Mr. Ornitz said is admissible solely as against him and whatever Mr. Freeman said is admissible solely against him.

THE COURT: Exactly. I consider myself
in the same position as the jury, and in that
case I would say to the jury, neither side does
not object but you understand that only the party
who makes the admission is accountable for it,
and he may only be charged with it. The mere
fact that he said Mr. X or someone else is also
accountable has nothing whatsoever to do with
this case and you are to disregard it. All right.

MR. WALL: Yes, sir.

MR. BELDOCK: Yes.

THE COURT: Do we understand that the constitutional objection to the admissions, because of the violation of the right of confrontation is waived?

I understand that and the parties understand it.

MR. WALL: Yes.

MR. BELDOCK: Yes.

THE COURT: All right. You gentlemen said

that you are ready to arrive at some stipulations of fact.

MR. WALL: I think that we have arrived at them, but I think it would probably more easily be understood if we do them in the sequence in which they arise.

THE COURT: All right.

MR. FRIED: I should note that purposes of the record that copies of all the documents that the government intends to introduce during this trial and all the exhibits, with the exception of the suitcases which are now in the courtroom, have been seen and examined by both counsel.

Secondly, I have --

THE COURT: For the record --

MR. WALL: That is so.

MR. FRIED: That is with the excepti on of certain 3500 material which, when it becomes necessary, I will turn over. I should note that Mr. Levine has just handed me some scribbled notes which he says are the notes that he took of the meeting with Mr. Wall's client, Mr. Kim Ornitz, the meeting at my office last Thursday.

MR. WALL: Why don't I go through them.

It seems to me more important that Mr. Beldock see them than I do, but I will look at them.

THE COURT: Suppose you mark them for identification.

THE CLERK: So marked as Government's Exhibit 8 for identification.

(So marked.)

MR. FRIED: The next thing I would like todo is notify the Court that I have provided to the counsel for the defense a copy of the arrest record for the witness Mr. Jock Davis.

THE COURT: Who?

MR. FRIED: John Spencer Davis, and have informed them of the arrest record and other relevant pertinent material for all the other witnesses that will be in the case. I left them upstairs and I will bring them down in order that they be marked.

THE COURT: The random notes that Mr. Levine says he made are marked.

MR. FRIED: I would like this to be marked as an exhibit. This is the arrest record on the witness John Spencer Davis. The record on the other defendants I have in my office.

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THE CLERK: So marked as Government's Exhibit 9 for identification.

(So marked.)

MR. FRIED: All of the other documents that I referred to will come in the ordinary course of the trial.

THE COURT: Will you call your first witness,
Mr. Fried.

MR. FRIED: Your Honor, with the consent of the defendants, the first witness will be Mr. James Boyd, who is the chemist who analyzed the material that was found in the suitcase received from Rosalys Rudner.

We are doing it out of order that way for the convenience of this witness.

JOHN BOYD, JR., having been first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. FRIED:

- Q Mr. Boyd, will you please . state your name and occupation.
- A My name is John Boyd, Jr. I am a U.S. forensic chemist, U.S. Customs forensic chemist.

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Q For how long have you been so employed? I have been employed for ten years and I have been employed as a forensic chemist for three years.

Q Would you tell us the university that you graduated from?

Allen University, Columbia, South Carolina, and I have also gone to Hunter College and City College recently, taking courses in chemistry and mathematics.

Q During the course of your official duties as a forensic chemist did you on the --

> MR. FRIED: Because we are trying this without a jury, unless you have any objection, I would not go into any further qualifications.

MR. BELDOCK: We will concede that he is an expert.

MR. WALL: Conceded.

Mr. Boyd, did you have occasion on the 14th of August, 1973, to examine samples that were brought to you by special agent J. Sylvestro of cocoa leaves and various other kinds of powders?

I did. A

Q And this was examined by you in the course of your official duties?

A Right.

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MR. FRIED: I would like this to be marked as a government exhibit, No. 10 for identification.

THE CLERK: So marked.

(So marked.)

MR. WALL: No objection when you offer it.

THE COURT: You have no objection to it

being offered?

MR. BELDOCK: None.

THE COURT: Are you ready to offer it?

MR. FRIED: Yes.

THE CLERK: Government's Exhibit 10 previously marked for identification now marked in evidence.

(So marked.)

BY MR. FRIED:

Mr. Boyd, I show you Government's Exhibit 10 in evidence and ask you if that is the report that you prepared in examination of the sample brought to you by Agent J. Sylvestro?

A It is.

Q Can you tell the Court what in your opinion was contained in those samples that were brought to you?

A The large envelope contained the following items, according to the analyses:

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A Neutron activation?

Coca leaves -- Net weight received 7 grams - Net weight returned 6 grams;

- Cocaine hydrochloride having a p urity of 99%.
 Net weight received 0.5 gram -- Net weight
 returned 0.2 gram.
- Five capsules, "Dexamyl Spansules", containing dextroamphetamine Sulfata admixed with amobarbital, controlled.

One white tablet containing meprobamate, controlled.

 Cocaine hydrochloride having a purity of 98% admixed with an inorganic salt.

Net weight received 2.7 grams -- Net weight returned 2.0 grams.

5. Three pink tablets containing no controlled substances. Gross weight returned in envelope 132 grams.

This is only for the seizure room. I signed and the chief chemist signed.

Q Mr. Boyd, in conducting this analysis did you follow the standard chemical tests?

A As outlined in our Customs Manual.

Q Are you familiar with what is known as Nuclear --

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Neutron activation analysis?

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I have heard of it but I have no expertise in that field.

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Do you have any knowledge of your own whether there is sufficient sample from this amount that you analyzed to use for neutron activation analysis?

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Is it sufficient -- isit an official --A

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Q The quantity.

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A sufficient amount?

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THE COURT: I am going to sustain objection to that question. The witness has already disqualified himself.

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MR. FRIED: Then I have, as to this witness,

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your Honor, no further questions.

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MR. BELDOCK: May I ask, were you requested by the Government, Mr. Boyd, to make a comparison

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between the cocaine referred to from your testi-

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mony just now and covered by your report and

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THE WITNESS: No, I was not.

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CROSS-EXAMINATION

any other cocaine?

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BY MR. BELDOCK:

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Do you know whether anyone in your department was requested by the government to make any comparison

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between the amount of cocaine covered by your report and any other cocaine?

A No, I do not.

Q Were you questioned by anyone for the government concerning the issue of making a comparison of this cocaine you testified about and any other cocaine?

A No, I was not.

THE COURT: Mr. Wall?

MR. WALL: No questions.

THE COURT: Mr. Boyd --

MR. BELDOCK: I can ask one question.

BY MR. BELDOCK:

Q The weight of cocaine involved, could you describe for the Court what size it is?

A Cocaine, a half a gram.

Q What amount in size would that come to?

A half a gram of cocaine received in item No. 2.

Q Is there any way you could physically describe for us how big or small that half a gram was?

A It's very small.

THE COURT: What is that, about a third of an ounce or a quarter of an ounce?

THE WITNESS: Less than a third.

Q How about the 2.7 grams?

	Boyd - cross	271	
	A It's about 3/10ths of an ounce.		
	THE COURT: How many grams?		
	MR. BELDOCK: 2.7.		
!	THE COURT: You say that is what wei	ght?	
6	THE WITNESS: 2.7 grams.		
7	THE COURT: You said it was what par	t of	
8	an ounce?		
9	THE WITNESS: One-tenth of an ounce.		
10	THE COURT: One-tenth of an ounce?		
11	MR. BELDOCK: Less than one-tenth of	an	
12	ounce.		
13	THE WITNESS: Less than one-tenth.		
14	Q If 2.7 is less than 1/10th, then .5 -		
15	A Is much less.		
16	Q is much less. I though t you had	said	
17	it's less than a third, but it is even much, much less;		
18	right?		
19	A (No response.)		
20	Q Was August 14 the first date that the govern-		
21	ment requested a chemical analysis of the cocaine that		
22	you have testified about?		
23	A Well, the only thing I can tes tify to is th	e	
24	fact that I received it on that date. As far as wh	ether	
25	it was submitted before, I have no knowledge of tha	t.	

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Q Wasn't it submitted earlier? AGENT LEVINE: It was submitted the day

after the arrest.

Q It was submitted in June, wasn't it, according to the report?

June 19, according to this report.

Q The date of the report, let's just establish this, you received this material for examination on June 19, 1973 and the first official report of a chemical analysis of it was August 14, '73, is that right?

Right.

Would that be the date or approximate date of the actual chemical analysis?

A It is approximately the date, because sometimes the reports are lying around until the typing ty pes them up. It is approximately the date --

Q You made this report and you made this analysis, right?

Right. A

Q Relating to the date of August 14, '73, approximately what date did you actually make th is analysis?

It was probably on the 14th, August 14. A

Q You looked at something to refresh your

recollection?

A This is just an Apeco copy of the same thing.

Q You are reviewing the same thing. You now say it was probably August 14, is that right?

A Yes.

Q And that's the only report that was made, right?

A By me, yes.

Q Anyone else?

A I don't know.

Q This is the only report the government has?

MR. FRIED: That is the only report the government has.

MR. BELDOCK: No further questions.

MR. FRIED: Your Honor, we had originally agreed to stipulate to all of the evidence, but in light of the earlier questions I think it would be -- I make application to open direct and let the witness identify the size and we will have a sense of the size.

THE COURT: I can't believe the conversion of grams into ounces. You say 2.7 ounces -- 2.7 grams is a half an ounce?

THE WITNESS: I didn't say a half an ounce,

did I?

THE COURT: I thought that's what you had said.

MR. WALL: I thought I heard him say 3/10ths of an ounce, then that was corrected to less than one half an ounce.

THE COURT: I can just take judicial notice of the correct conversion, but it just doesn't sound right to me.

Can you express an opinion with any reasonable degree of scientific certainty as to the origin of the cocaine that you analyzed and the coca leaves that you analyzed?

THE WITNESS: No, sir.

MR. FRIED: I have three small bags that

I request be marked as government's exhibits.

THE CLERK: So marked Government's Exhibits 11, 12 and 13 for identification.

(SO marked.)

MR. FRIED: I offer Government's Exhibits
11, 12 and 13 into evidence.

MR. WALL: The record has not disclosed precisely what they are.

THE COURT: You will ask the witness whether

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this is the cocaine he examined and whether these are the coca leaves he examined.

THE CLERK: Government's Exhibits 11, 12 and 13, previously marked for identification, now marked in evidence.

(So marked.)

REDIRECT EXAMINATION

BY MR. FRIED:

Mr. Boyd, I show you Government's Exhibits 11, 12 and 13 in evidence and ask you to describe to the Court what they are.

A This is a pouch made of cloth and I see a mark here,
I think it looks like my mark, and this is just two
envelopes, one containing a metal container.

Are those Exhibits 11, 12 and 13, do they constitute the quantities of cocaine and coca leaves that you examined in your report?

A That's right.

MR. FRIED: I have no further questions.

THE COURT: I assume that there is a

stipulation on the chain of custody?

MR. BELDOCK: Yes, Judge.

MR. WALL: Yes.

THE COURT: And you concede thatthis is

the coca leaves and this is the cocaine that was seized from John Spencer Davis, or the package that he was carrying on June 18, 1973?

MR. WALL: Yes.

MR. BELDOCK: Yes.

MR. FRIED: No further q uestions , your Honor.

RECROSS EXAMINATION

BY MR. BELDOCK:

I notice that one of those exhibits has a little metal container with a top stopper. What is that, or do you know what it is, just a little metal jar?

A Well, it has a stem going into the jar, if I can remember correctly. But what it is I don't know. As far as I am concerned, it is just something to close the top.

Q The cocaine, as it came to you, was inside of it?

A Right.

Q The other little envelope h as cocaine supposedly in some sort of fabric which I can't understand. Do you know what that was?

A This fabric here?

Q Inside your cellophane envelope there is some fabric.

These are what you call ducks, and this is what the

of them. I have it on the back of the card. I received it in these packages here on the inside. This cellophane package is the property of the laboratory.

MR. BELDOCK: Thank you.

THE COURT: Anything further?

Thank you, you may step down, Mr. Boyd.

THE WITNESS: I would like to say that on the weight conversion of 2.7 grams, it was supposed to be .1 ounce instead of --

THE COURT: One-tenth of an ounce?

THE WITNESS: Yes.

THE COURT: I thought it was closer to an ounce, but I don't know, I will look it up on the conversion table. My two law clerks will be researching that all afternoon.

THE WITNESS: It is 28.3 grams per ounce.

THE COURT: It adds up, that's right. A

kilo is 2.2 pounds, or 35 ounces.

(Continued on next page.)

DDS/LH 2PM (1) MR. WALL: Your Honor, the witness having left, and having been called out of turn for his own convenience, I think both Mr. Beldock and I, and perhaps the Court, would appreciate an opening statement from Mr. Fried.

It is quite possible we might have a motion to make after he tells us what the best of his case is.

years granted a motion to dismiss on the opening statement. It might come as a complet surprise to you that the Government is not required to make an opening statement. As a matter of fact in some states the prosecution doesn't make an opening statement. So you certainly have no right to dismiss a case if he did make one.

MR. WALL: No, what I am saying is that if you find out from his opening statement that what he intends to prove within your discretion would be insufficient you might inquire further and if he has nothing further as to what you deem to be sufficient you might dismiss.

THE COURT: There isn't a chance.

I learned something about the case from the

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hearing. I know I must hear the whole case.

If you want to make an opening statement

I will allow it. I will allow counsel to make an opening statement --

MR. FRIED: I didn't request it because notbeing before a jury I thought it was unnecessary.

THE COURT: That is right.

When I sat in the Supreme Court in Queens

County one of the first cases that came to me -
I think it was a civil case of course -- defendant's

counsel moved to dismiss on the opening statement,

and being a new Judge and having been in the area

of a 49 year old I researched it in depth. And

I found one case dismissed on the opening state
ment. And when I went deeper into that case I

learned that it was dismissed because the complaint

was insufficient as a matter of law. So it was

really a motion to dismiss for insufficiency of

the complaint.

I challenge you to find one case, Federal or State reports, where it was dismissed because the plaintiff or the prosecutor did not make out a full case, did not offer evidence on every essential element of the crime.

(The potential witness thereupon conferred

with Mr. Sanford Katz.)

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MARILENE TAMBINI, called as a witness having been first duly sworn by the Clerk of the

Court testified as follows:

THE CLERK: May we have your full name?

THE WITNESS: M-a-r-i-l-e-n-e T-a-m-b-i-n-i.

THE CLERK: Be seated please.

DIRECT EXAMINATION

BY MR. FRIED:

Q Would you please state your name loud and clearly please?

A Marilene Tambini.

Q Thank you.

Can you tell us how old you are?

A 22 years old.

Q Miss Tambini where were you born?

A In Brazil.

Q In what country are you a citizen?

A Brazil.

Q Can you tell us when you left Brazil and came abroad?

A 1971.

Miss Tambini, are you or were you a defendant in this case?

A Pardon me?

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1	5 Tambini-direct/Fried
2	Q Were you charged with the crime of bringing
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4	A Yes.
5	2 And did you plead guilty to the crime of
6	possessing cocaine on board an aircraft when it wasn't listed
7	in the official manifest?
8	A Yes I did.
9	Did you plead guilty before this Court on
10	September 4, 1973?
11	A Yes I did.
12	Q At the time that you pled guilty, were there
13	any promises made to you by the Government?
14	A No.
15	Q Was there any understanding that you had or
16	any reason why you pled guilty at that time?
17	(Witness confers with Mr. Katz.)
18	A Yes, I pled guilty because I was guilty.
19	Q And in exchange for your plea of quilty at
20	that time, Miss Tambini, did the Government agree that at
21	the time of sentencing it would dismiss certain other counts
22	against you?
23	A Yes.
24	Q Would you also in exchange for that plea of
25	guilty expect that you would testify in this current trial?

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1	6 Tambini-direct/Fried
2	A Yes.
3	Q And in exchange for testimony at this trial,
4	do you expect anything from the Government?
5	A No sir.
6	Q Do you expect that the Government will at least
7	bring to the attention of whoever the sentencing Judge is
8	that you did testify before the Court in this case.
9	A Yes.
10	Q Now, Miss Tambini, you stated that you are a
11	citizen of Brazil.
12	In 1973, in May of that year approximately,
13	can you tell us where you were living?
14	A I was living in London.
15	Q In Londong?
16	MR. FRIED: Can you speak up more clearly.
17	Can you hear her (addressing counsel for
18	the defendants.)
19	Q When you were living in London whom were you
20	living with?
21	A With Hermano Albuquerque.
22	Q Did there come a time toward the end of May of
23	that year when you became involved in the case that is now
24	before this Court?
25	A Yes.

Tambini-direct/Fried
Q Did there come a time at the end of May, 1973
when somebody came to see you in London?
A Yes.
Q Can you tell us who it was that came to see
you?
A Francisco Rudge.
Q Can you tell us when he came to see you where
were you living at that time?
A Where? The address?
Q The address please.
A 25 Kensington Park Gardens.
Q While you were living at Kensington Park Garde
and Francisco Rudge was there did there come a time when you
discussed with him the possibility of importing cocaine into
the United States?
A Yes. He was talking about making a movie in South
America and I was to make part of the movie. But we didn't
have any money. So he asked me if I could be a carrier for
some cocaine.
Q Can you tell us as precisely as you remember
what it was that he said to you and what it was that you said
to him?
A He said that he needs this money to make the movie.
And if I could transport some cocaine from South America into

Did you then come to the United States?

1	9	Tambini-direct/Fried
2	A	Yes, a few days after.
3	3	Q And who did you travel to the United States
4	with?	
5	A	Mr. Hermano Albuquerque.
6		Q And how did you arrive in the United States?
7	By wh	at airline? Do you recall?
8	A	BOAC.
9		Q Can you tell us who it was that purchased or
10	sent	you the BOAC tickets? Where did you receive the BOAC
11	ticke	ts from? The airline tickets?
12	A	From New York.
13		Q And who sent them to you?
14	A	Francisco sent them to us. It was just a gift.
15		Q And when you you said you arrived in New
16	York.	Was that on the 2nd of June, 1973?
17	A	Yes.
18		And when you arrived in New York were you met a
19	the ai	rport by anybody?
20		THE WITNESS: Could you repeat that?
21		Q When you arrived in New York who if anybody met
22	you at	the airport?
23	A	Francisco and Rosalys.
24		Q Can you tell us is that Rosalys Rudner?
25	A	Yes.

	Tambini-direct/Fried
:	Q Can you tell us where you went with Mr. Rudge
;	and Miss Rosalys Rudner?
4	A To the Albert Notel.
5	Q When you arrived at the Albert Hotel what if
6	
7	A I went to my room and took a shower.
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10	importation of cocaine from South America?
11	A Yes, a few days after we arrived.
12	Q Do you recall where that conversation took
13	place?
14	A I think in the Albert Hotel.
15	Q Can you tell us who was present at the time
16	that you had this conversation?
17	A It was the four of us.
18	Q Now, Miss Tambini, will you tell us as best
19	you can recall
20	THE COURT: Did you say with the "four of
21	us'?
22	THE WITNESS: Yes.
23	THE COURT: Which four?
24	THE WITNESS: Rosalys, Hermano, Francisco,
25	and me.

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Tambini-direct/Fried

But I must say that it was Francisco,

Rosalys and me were talking about making a deal.

And dermano Alburquerque, he was just present, you know, but he wasn't participating in the conversation.

BY MR. FRIED:

- Q Would you tell us what if anything was said at that meeting between yourself and Mr. Rudge and Miss Rosalys Rudner?
- A Yes, we talked about going to South America.
 - Q Can you be specific and tell us as best you can recall what was said?
- 14 A Oh, well, that --

THE COURT: You will have to speak a little louder, Miss Tambini. I have difficulty hearing you.

THE WITNESS: I would go to Buenos Aires -THE COURT: Can you identify who said what?
Who said you were to go to Buenos Aires?

THE WITNESS: Francisco. And I should stay there waiting for Rosalys. And she would come to me and give me the cocaine.

THE COURT: Did they take you where you would be staying in Buenos Aires?

Tambini-direct/Fried

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THE WITNESS: Yes.

THE COURT: Who said that?

THE WITNESS: Well, afterwards I made

reservations. But at this time, you know, we just talked about the hotel.

THE COURT: Did you pick the hotel in Buenos Aires or did someone else do that?

THE WITNESS: In the airlines, the agents,

they told me that that was a good hotel.

BY MR. FRIED:

Q Do you recall if anything else at this time was discussed concerning the cocaine that you were going to pick up in South America?

Was there any other discussion at this time concerning the cocaine?

A No.

Q Will you tell us then what next happened prior to your departure from New York?

A I went to buy tickets. I made reservations.

Q Who gave you the money to buy the tickets and for the reservations?

THE WITNESS: Excuse me.

(The witness confers with Mr. Katz.)

MR. BELDOCK: May the record reflect

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1	13 Tambini-direct/Fried
2	at this time there is a conference
3	THE COURT: I do not think I will permit
4	counsel to consult with the witness except where
5	it involves a Constitutional question.
6	Counsel is not to interpret the question.
7	If you don't understand the question tell
8	Mr. Fried.
9	Now, I do not think you need an interpreter,
10	do you?
11	THE WITNESS: No.
12	THE COURT: You understand the language
13	pretty well?
14	THE WITNESS: Yes.
15	THE COURT: Well, I can't permit counsel
16	in effect to be answering the questions.
17	(continued on next page)
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DDS/LH	1
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Tambini-direct/Fried

MR. KATZ: I understand that, your Honor, but on the other hand I do not feel that I can -- well, can stand up and say this, that this is the time to advise my client.

THE COURT: That is the way it has to be done. The witness must assert her constitutional privilege against self-incrimination. And I would ask that she then consult with counsel.

MR. KATZ: Well, your Honor, we are trying to give as full an exposition of the facts as possible. I do not wish to advise the Court what I am telling my client or what she is asking me. I am certainly not coaching her.

THE COURT: Well, apparently counsel feels that there might be some interference between the witness in the response. And you are there neither as the interpreter --

MR. KATZ: I understand that.

THE COURT: -- nor the adviser as to whether or not it is -- or how to answer the question.

MR. KATZ: No, I understand that.

THE COURT: But if you feel that she would like to assert her constitutional right against self-incrimination then you may have as free a

1	2 Tambini-direct/Fried
2	discussion as you wish in private.
3	All right.
4	THE WITNESS: Well, I will answer the question
5	I stated it was Francisco who gave me the
6	money. But I was mixed up. In fact it was
7	Rosalys who gave me the money.
8	THE COURT: I find it difficult hearing
9	the witness from this point. Would you repeat
10	that.
11	THE WITNESS: I stated, Sir, that Francisco
12	Rudge gave me the money. But in fact it was
13	Rosalys who gave me the money.
14	THE COURT: You mean it was Rosalys money
15	but he gave it to you?
16	THE WITNESS: Yes, she gave it to me, the
17	money.
18	THE COURT: How much money?
19	THE WITNESS: Just to buy tickets and
20	\$500.00 to buy some travelers checks.
21	THE COURT: Did you have any money of
22	your own?
23	THE WITNESS: Yes, I had \$500.
24	THE COURT: Of your own personal money
25	when you came to this country?

1	3 Tambini-direct/Fried
2	THE WITNESS: Yes.
3	THE COURT: I see.
4	BY MR. FRIED:
5	Q Miss Tambini, after you purchased the tickets
6	and made a reservation for the hotel in Buenos Aires and prio
7	to the time that you left New York City would you tell us
8	whether you had any other conversation with Mr. Rudge or with
9	Miss Rosalys Rudner concerning this importation of cocaine?
10	A No.
11	Q And then did a time come when you departed
12	New York City on an aero-flight Aero Lineos Aregentinas,
13	the Argentinas Airlines of Buenos Aires?
14	THE WITNESS: Could you repeat that question?
15	Q Did you leave New York City on the 7th of June
16	for Buenos Aires, Aregentina?
17	A Yes.
18	Q Will you tell us what airline you flew on?
19	A Yes, the Airline Argentinas, something like that.
20	Q Will you tell us when you arrived in Buenos
21	Aires where you went?
22	A I went to the Sheraton Hotel.
23	Q Did you register at that hotel?
24	A Yes.
25	Q While you ware there, were you waiting for some

			Tambini-direct/Fried
		2	body in Buenos Aires?
		3	A For Rosalys.
		4	Q Did there come a time when Rosalys arrived in
		5	Buenos Aires?
		6	A Yes. I don't remember which day.
		7	Q When she came to Buenos Aires did she meet with
		8	you did you meet with her in Buenos Aires?
		9	A Yes.
		10	Q Will you tell us where you met her?
		11	A At the hotel. She registered herself in my room.
		12	Ω At that time was there anything that she brough
		13	to you?
		14	A These two suitcases.
		15	MR. FRIED: I would like to offer into
		16	evidence for identification first Government's
		17	Exhibits 14 and 15.
		18	THE CLERK: So marked Government's Exhibits 14
		19	and 15 for identification.
		20	(Articles referred to consisting of two
		21	suitcases were received and marked Government's
		22	Exhibit 14 and 15 respectively for identification.)
мм	fls	. 23	(continued on next page)
		24	(concinued on next page)
		25	

MM:pc Tambini - direct take 3/1 2 MR. FRIED: I would like to offer these 3 in evidence as Government's exhibit 15 and 14. 4 MR. WALL: No objection. 5 MR. BELDOCK: No objection. 6 THE COURT: Let exhibits just referred 7 to be marked in evidence. 8 THE CLERK: So marked. 9 (So marked.) 10 DIRECT EXAMINATION 11 BY MR. FRIED: (continued) 12 Q I show you what has been marked as 13 Government's exhibits 14 and 15, and ask you if these are 14 the suitcases that Miss Rudner brought to you? 15 Yes. 16 Q When she brought you these two suitcases, 17 did you know at that time what was inside of them? 18 Yes. 19 Q Would you tell us what, if anything, she said 20 about them? 21 A No, she just told me to --22

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MR. BELDOCK: I will object before the answer is made so that I can have a standing objection to any statements of alleged coconspirators.

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Tambini - direct

THE COURT: Well, at this point I usually give instructions to the jury to the reason for admitting this conversation into evidence and I would say it is outside the hearing of either of the defendants and we cannot charge it against them, disregard it unless and until and I give all the evidence that must be proved, that a conspiracy existed at about the time the indictment is alleged and the conversations were in pursuance of the objectives of the conspiracy and during the term of the conspiracy, and then it is only chargeable against the defendants if it is proved beyond a reasonable doubt that the defendant to be charged knowingly and willingly entered into the conspiracy, and then I might go into a charge on what knowingly and wilfully means in a narcotic conspiracy, that you knew the narcotics were imported and so forth.

I am cognizant of all this.

So far nothing connects the defendant.

MR. BELDOCK: I wanted to object someplace on the record so it may stand.

I will repeat -- well, I won't repeat

Tambini - direct

such objections unless it is something new.

THE COURT: Knowing what I know about this case, all this testimony is going to be held in reserve until I hear how it connects either or both of the defendants. If it does not, then the indictment must be dismissed. If it does, then I will consider it.

MR. WALL: I take it we have a standing agreement that Mr. Beldock and I are in effect, joining in each other's objections?

THE COURT: Yes. I am glad you said
that. Not only that, if you consent to a statement or physical evidence going into evidence
you are only saying that it is relevant, but
you still preserve the objections that you
raised in the hearing on the motion to suppress.

All those objections are preserved.

So don't worry about anything that you might forget.

I understand that that is a very substantial issue, and you intend to preserve it. So you don't have to be on a fishhook throughout the trial worrying about missing it at any point in that way.

1		Tambini - direct
2		You have it.
3		MR. WALL: Thank you.
4		Q When you received these bags, did you know
5	what w	was inside of them?
6	A	Yes.
7		Q Would you tell us what was inside of them?
8	A	Cocaine.
9		Q Did you know at that time how much cocaine
10	was in	nside of them?
11	A	No.
12		Q Was there any conversation that you entered
13	into v	with Miss Rudner at that time about these bags?
14	A	No.
15		THE COURT: Did you look in the bags?
16		THE WITNESS: No, I did not open them.
17		I did not see the cocaine.
18		THE COURT: You never actually saw it?
19		THE WITNESS: No.
20		THE COURT: Did you put any of your
21		personal belongings into either of the bags?
22		THE WITNESS: Yes.
23		THE COURT: Did you see a package there
24		in either bag?
25		THE WITNESS: It wasn't a package. It

1	Tambini - direct
2	next did, if anything?
3	A Well, the next morning we travelled back.
4	Q Did you return back on the same plane as
5	Miss Rudner?
6	A Yes.
7	Q When you say you travelled back, you mean a
8	flight from Argentina to New York City?
9	A Yes.
10	Q Was that a flight on Pan American?
11	A Yes.
12	Q By the way, do you know what Miss Rudner's
13	occupation was?
14	A No.
15	Q Do you know whether she was studying anything
16	A Maybe she was studying English. I know she talked
17	to me about it, but I am not sure.
18	Q Prior to the time that you returned to
19	New York on the Pan American flight, did you have any
20	conversation with Miss Rudner concerning what was to be
21	done with these two suitcases?

A Nol.

Q What did you intend to do with these two suitcases?

Well, I would bring them to the Albert Hotel.

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Tambini - direct

Q And at the Albert Hotel, what did you intend to do with them?

A I would give them to Rosalys and San Francisco.

THE COURT: Did you know Miss Rudner before you met her at the Albert Hotel in May, prior to the time you went to Buenos Aires?

THE WITNESS: Yes, I met her once before here in New York.

THE COURT: How long before that?

How long before the date that --

THE WITNESS: Around exactly a year.

THE COURT: A year before?

THE WITNESS: About then.

THE COURT: You had not seen her for a period of one year?

THE WITNESS: Yes.

Q When you arrived at the airport at Buenos
Aires with Miss Rudner, did you both check your suitcases
together in the airport?

A In New York?

Q No, in Argentina before boarding the Pan American flight.

A Oh, yes.

Q Do you recall the type of luggage that

4 5

Tambini - direct

Miss Rosalys Rudner was carrying?

A I did not pay any attention to that. I don't remember.

Q When you arrived in New York, did you come off the airplane with Miss Rudner?

A No.

Q Will you tell us, upon arrival in New York, what happened to you if anything?

A When I arrived in New York?

Q Yes.

A I just got off the plane --

THE COURT: Did you see her come off
the plane? Did you see her deplane?
THE WITNESS: No, I went first.

Q Continue, please.

A I came first and I went through customs -- I mean through immigration and then through customs and here I am.

THE COURT: Did you talk with her?

Did you discuss with her that you would deplane first? Did you talk about that?

THE WITNESS: Yes, we talked before, yes.

THE COURT: Did she give you any

Tambini - direct

instructions on what to say to customs officials or immigration officials?

THE WITNESS: I just asked her which address to put on the slips.

THE COURT: That's all?

MR. BELDOCK: I didn't hear that.

THE COURT: Just discussed what address to put on the slip, meaning the customs declaration.

When you say slip, you mean the customs declarations; is that right?

THE WITNESS: Yes.

MR. BELDOCK: I would like the record to reflect the fact that Mr. Katz is speaking to the witness. I am not objecting to that but --

MR. KATZ: I asked her whether it was the immigration slip or customs slip.

THE COURT: I would rather if there is a question that you go to Mr. Fried, that Mr. Fried ask all the questions. No communication with the witness, please.

THE WITNESS: Well, it was in both slips that you must put your address.

Tambini - direct

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I am sorry, I did not understand you.

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Rosalys, I asked her which address I should put down on the slips that they gave to you to fill out.

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What did she tell you?

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She told me that I should put the hotel, a hotel, and I looked at a magazine and I put a hotel that was in America.

> MR. FRIED: At this time I have several points that counsel and I have agreed on and I would like to have these identified for purposes of completeness.

THE COURT: Let me make certain that counsel agree that these are the slips and that there are no objections to those going into evidence.

Mark them.

MR. FRIED: I request the declaration card marked for Miss Tambini and Miss Rudner.

THE CLERK: First one is marked Government's exhibit 16 for identification and the second one is marked Government's exhibit 17 for identification.

(So marked.)

MR. FRIED: The next one I have is a

1	1 1	Tambini - direct
	2	passport.
×	3	THE CLERK: Passport marked Government's
	4	exhibit 18 for identification.
	5 × .	MR. FRIED: Pan American ticket is
	6	next.
	7	THE CLERK: Ticket marked Government's
	8	exhibit 19 for identification.
	9	(So marked.)
	10	MR. FRIED: A hotel bill.
	11	THE CLERK: Hotel bill marked Government's
	12	exhibit 20 for identification.
	13	(So marked.)
	14	MR. FRIED: The next is an airline
	15	ticket.
	16	THE CLERK: Marked Government's exhibit
	17	21 for identification.
	18	MR. FRIED: And a set of baggage stubs.
	19	THE CLERK: Marked Government's exhibit,
	20	that is, two airline stubs marked Government's
×	21	exhibit 22 for identification.
	22	(So marked.)
	23	MR. FRIED: I offer at this time
	24	Government's exhibit 17 through 22 for
	25	identification as Government's exhibits in

Tambini - direct

evidence.

THE COURT: I understand that that is with the consent of the defendant?

MR. BELDOCK: Yes.

MR. WALL: Yes.

THE COURT: On their consent they may be marked.

THE CLERK: Government's exhibit 16 through 22 inclusive previously marked for identification are now marked in evidence.

(So marked.)

THE COURT: If you know that they consent to them just mark them in evidence the first time.

MR. FRIED: Yes, I know, your Honor.

THE COURT: They have no meaning unless they are connected with the evidence, but we do mark exhibits in evidence in advance with the consent of parties even if it is out of order.

Q I show you what has been marked Government's exhibit 20 in evidence, and ask you if you can tell the Court what that is?

A That is the bill of the hotel in Buenos Aires.

Tambini - direct

		Q	1	nov	w sho	ow yo	ou (Gove	rnme	nt's	exhi	bit nu	mber
21	in	evide	ence	and	ask	you	if	you	can	tell	the	Court	what
th	at :	is?											

- A It is an airlines ticket that I took from New York to Buenos Aires.
- Q I show you Government's exhibit 16 and 17 and ask you if you can tell us what they are.
- A These are the customs slips of mine and of Rosalys.

I guess it is of Rosalys.

- Q I show you Government's exhibit 18 in evidence.
- 13 A That is my passport.
 - Q I show you Government exhibit number 19 in evidence.
 - A This is my two-way ticket from London to New York.
 - Q I show you Government's exhibit number 22 in evidence.
 - A I cannot remember, but I guess it is mine, luggage tickets.

MR. FRIED: At this time I would like to offer Government's exhibits number 1 in evidence which was marked for identification at the hearing or in evidence at the hearing as Government's number 1 for the purposes of this

Tambini - direct

trial.

THE COURT: Any objection?

MR. WALL: No.

MR. BELDOCK: No objection.

THE CLERK: So marked.

(So marked.)

Q I show you Government's exhibit number 1 in evidence and ask you if you can tell us what that is?

A This is my friend Rosalys.

Q Are those 4 photographs all of Rosalys Rudner?

A Yes.

MR. WALL: Excuse me, your Honor, do you have the passport which is Government's exhibit 18?

If you are finished with it, may I look at it?

THE COURT: Yes, I hand you Government's exhibit 18.

Q Then as you stated, as you had come into the American customs area, you had just filled in the immigration forms, and did there come a time when you were arrested at the airport?

Did there come a time when you were arrested at the John F. Kennedy Airport?

	Tambini - direct
	A Yes.
	3
	Q Can you tell us by whom you were arrested?
	Do you know who arrested you?
	A No, I don't.
(THE COURT: Do you see the man in court?
7	THE WITNESS: Oh, yes, Mr. Levine.
8	Q And the other agent?
9	A And Mr. King.
10	Q Did there come a time when you made certain
11	
12	
13	MD FRIED. T have as 6
14	MR. FRIED: I have no further questions
	of this witness I am sorry, I have another
15	question.
16	Q Do you know the defendants in this case who
17	are currently in this courtroom?
18	A No.
19	Q Have you ever met them before?
20	Year over mee them before?
	me, just in court.
21	MR. FRIED: I have no further questions.
22	CROSS EXAMINATION
23	BY MR. BELDOCK:
24	O Have you ever mot Stanton Tong

Have you ever met Stanton Freeman before?

25

Never.

Tambini - cross/Beldock

MR. BELDOCK: May we have a five minute recess, your Honor?

THE COURT: We will take a five minute recess.

(After the recess)

MR. BELDOCK: Before we proceed with Mis Tambini, we request the Government turn over to us any notes of conversations, any memoranda regarding Miss Tambini.

We have already received the typewritten statement of Miss Tambini witnessed by Michael Levine which I am told by Mr. Fried is the only typed statement. We are now asking for any notes, memoranda or rough drafts.

(continued on the next page.)

Service of three (3) copies/of the within

Officially is hereby admitted

this 22 at day of March, 1994

Attorney(s) for